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REPORTS

OF

DIVERS SPECIAL CASES,

ADJUDGED IN THE

COURTS OF KING's BENCH, COMMON PLEAS, AND EXCHEQUER,

IN THE

REIGN OF KING CHARLES II.

COLLECTED BY

SIR THOMAS RAYMOND, KNIGHT,

LATE ONE OF THE JUDGES OF THE KING'S BENCH AND COMMON PLEAS, AND ONE OF THE BARONS OF THE EXCHEQUER.

PRINTED FROM THE ORIGINAL MS. WRITTEN WITH HIS OWN HAND.

THE THIRD EDITION,

WITH MANY HUNDRED ADDITIONAL REFERENCES, AND

THREE TABLES.

THE FIRST—Of the Names of the Cases.
THE SECOND—Of Alphabetical Heads to which the Cases relate.
THE THIRD—Of the Principal Matters.

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Term. Mich. 12 Car. 2. B. R.

The Juſtices being

Sir *Robert Foſter*,
Sir *Thomas Mallet*,
Sir *Thomas Twiſden*,
Sir *Wadham Wyndham*,
} Juſtices.

Mary Griggs's *Caſe*.

MARY GRIGGS was indicted upon the ſtatute of 1 *Jac.* 1. *cap.* 11. for that ſhe the 28*th* of *February* 1653, was married to one *Nicholas Coats*, and that ſhe afterwards, *viz.* the 10*th* of *October*, 1659, the firſt huſband being then alive, married *Edward Cage*, &c. Upon not guilty pleaded, the firſt huſband was produced at the trial as a witneſs to prove the firſt marriage; but the court totally refuſed to admit of his teſtimony, and ſaid, That a wife could not be admitted to give evidence againſt her huſband, nor the huſband againſt his wife in any caſe, excepting treaſon, becauſe it might occaſion implacable diſſention, according to 1 *Inſt.* 6. *b.* And they denied the lord *Audley*'s caſe in *Hutton* 116. to be law; ſo the proſecutor having no other conſiderable witneſs, the jury brought in the priſoner not guilty. Witneſs. 2 Roll. Ab. 686.

Bateman and Lawrence, Sheriff of Middleſex, *verſus* Swift.

DEBT upon the ſtatute of *Eliz.* for poundage, for executing a writ of execution. Upon *Nil debet*, pleaded, and a verdict for the Plaintiff, *Sparks* moved in Parliament. Show. 363. Salk. 231.

* P. 2. * arreſt of judgment, that the ſtatute is miſ-recited, for the plaintiffs in their declaration ſay, that the parliament was held 28 *Eliz.* and the book at large ſays it was held the 29 of *Eliz.* but upon examination it appeared by the parliament roll that it was held the 28 of *Eliz.* and the printed book is falſe, therefore judgment was given for the plaintiff. *Vide* 1 *Anderſon* 291. *pl.* 303. a good caſe concerning the commencement of this parliament.

Seaman *verſus* Barnes.

Trover.
1 Danv. Abr. 24. p. 5.
1 Sid. 263. 98.
3 Keb. 253. 507.
2 Keb. 765.
Stile 358.
1 Vent. 114, 106.

TROVER for two pair of pot-hooks, *&c.* and hangers, *&c.* after not guilty pleaded, and a verdict for the plaintiff, *Allen* moved in arreſt of judgment, That hangers is a too incertain and equivocal word. *Baldwin* for plaintiff inſiſted upon it, That ſince pot-hooks preceded the word hangers, the court could not intend theſe were any other hangers than ſuch upon which pot-hooks uſe to hang. And he cited a caſe of *Trover* for a billiard-table, port, ſticks and balls, and adjudged good, becauſe the port, ſticks and balls ſhould be intended things appurtenant to the table. But the court was of opinion that it was too incertain a word, for the word does not immediately follow the word pot-hooks, but there are divers other things mentioned between; therefore judgment was ſtayed.

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* P. 3. * Term Hill. 12 Car. 2. B. R.

Woodward *verſus* Bonithan.

Court.
2 Danv. Ab. 262.
Lat. 11.
Moor 891. pl. 1225.
4 Inſt. 139, 140.
12 Rep. 103.
Hob. 107, 109.

A Maſter of a ſhip agreed with certain merchants concerning a voyage, and received orders from them to lay in proviſion of meat and drink, and alſo to provide mariners, *&c.* and after the voyage was finiſhed the merchants refuſed to pay the maſter of the ſhip what they had agreed for; upon which refuſal he libelled againſt them in the court of the Admiralty, *&c.* And now Serjeant *Wild* for the merchants moved for a prohibition, becauſe they are ſued upon a contract made upon land, and ſo the Admiralty has no juriſdiction. *Turner* againſt the prohibition, inſiſted upon

upon it, That when a thing is in its nature maritime, as here the mariners wages, the Admiralty ſhall have the conuſance of it; and ſo it was agreed by all the juſtices, *Hil.* 8. *Car.* 1. 1 *Cr.* and of this opinion was *Mallet* Juſtice: but *Foſter* Chief Juſtice and *Twiſden* Juſtice held a prohibition would well lie, for the ſtatute of *R.* 2. 15. *cap.* 3. was made at the great complaint of the Commons, and ſhould therefore be conſtrued moſt beneficially for the good of the ſubject; and when the ordinances and orders in the time of the late troubles were made, the conſtant and generally received opinion was, That for mariners wages, *&c.* the parties could not ſue in the Admiralty, and for that reaſon pretended orders were made on 12 *April* 1648. *cap.* 11. and another 23 *April* 1649, *cap.* 21. to enable the Admiralty to hold plea of ſuch things: and as to that caſe of 8 *Car.* 1. they ſaid, That that had not only been denied by ſeveral other judges as well as by themſelves at this time, but had been renounced even by ſeveral of thoſe judges who are ſaid to have ſubſcribed to it, for which reaſon a prohibition was granted. But all the judges agreed, that the granting of prohibitions is not a * diſcretionary act of the court, but are grantable *ex debito juſtitiæ*, and they denied my lord *Hobart*'s opinion in his Reports 67. which *Roll* Chief Juſtice they ſaid had frequently done before. * P. 4.

Reynolds *verſus* Burton.

ERROR upon a judgment given in *C. B.* in an action upon the caſe for words: the plaintiff declared, That the defendant being ſeiſed of certain land, *&c.* ſaid of the plaintiff, *Burton* had forged a deed to cheat me of my land, and he gave *A. B.* 40*s.* for ingroſſing it. Reſolved the words are actionable, and judgment was affirmed. Words. 1 Roll. Ab. 65. p. 1. 1 D. Abr. 149. p. 3.

Windhurſt *verſus* Gibbes.

COVENANT. The plaintiff declared upon a cuſtom in *London*, That every freeman may take an apprentice, and that infants may bind themſelves to ſerve, *&c.* After a verdict for the plaintiff, *Jones* moved in arreſt of judgment, that this cuſtom is only alledged *in fieri*, and not *in facto*, and conſequently naught; for preſcription conſiſts in the reiteration of acts, which this cuſtom, as Cuſtom.

here ſet out, has not to ſupport it; and he cited the caſe of 22 *E.* 4. 8. a cuſtom that every man may turn his plow upon the next land adjoining, if it is not ſown with corn; adjudged naught for not adding the uſage. So *Paſch.* 37 *Eliz. Biſhop*'s caſe, a cuſtom found within a manor, That every tenant of the ſaid manor *potuit & potuiſſet ſurſum reddere, &c.* and adjudged naught. So 21 *Jac.* Sir *William Hatton*'s caſe, *Licet & licuit* for the lord to aſſeſs a pain for the breach of a by-law, adjudged void. And the pleading of gavelkind lands, which are *partita* as well as *partibilia*, and of copy-hold lands *dimiſſa* as well as *dimiſſibilia*, ſeems to demonſtrate that the law is ſo. But the court was of the contrary opinion, and compared it to caſe of 21 *E.* 4. 28. and the *Old Book of Entries* 141. A cuſtom, that every citizen and freeman might deviſe in *Mortmain*, and allowed good; and to this * opinion the judges inclined in the *King* and *Bagſhaw*'s caſe, 1 *Cr.* 347. ſo the plaintiff had his judgment.

* P. 5.

Dethick *verſus* Bradbourne.

Error. 3 Danv. Abr. 242. p. 4. 2 Sid. 110, 117.

THE plaintiff had a judgment given for him in *B. R.* upon which the defendant brought a writ of error returnable in parliament, and the tranſcript of the record was certified, and errors were aſſigned, and the parliament diſſolved before they were determined. Now *Jones* moved in *B. R.* for execution upon this judgment, and cited 1 *H.* 7. *Pl.* 5. *page* 20. *Flourdew*'s caſe, and 2 *Cro.* 342. *Heydon* verſus *Godſalve*, That a writ of error in parliament is determined by the diſſolution of the parliament; the court after grand debate how it ſhould appear to them that the errors are indetermined above, and that the judgment is not there reverſed, at another day granted execution, and the reaſon they gave was, becauſe the record it ſelf was never out of this court, but only the tranſcript carried up by the Chief Juſtice, and there left; and when a judgment of this court is reverſed in parliament, the tranſcript is returned hither, and this record made according to the tranſcript ſo returned. *Quod nota.*

Newce

Term. Hill. 12 Car. 2. B. R.

Newce *verſus* Parker.

Intr. Mich. 12 Car. 2. Rot. 672.

ERROR out of *C. B.* upon a judgment there given in an action upon the caſe upon a wager, whether the eldeſt ſon of a puiſne knight bachelor, or the grandchild of an elder knight bachelor ſhould have the precedence by the judgment of a herald; and the herald gave precedence to the grandchild of the elder knight, and accordingly judgment was given in *C. B.* and that judgment they were here affirming, but the writ of error abated for falſe direction and miſrecital. Error.

* Payne *verſus* Minſhal. * P. 6.

DEBT for 15*l.* for rent. Upon demurrer to the declaration, the caſe was ſuch, The plaintiff demiſes by indenture, to Dame *Aſhfield* a widow, a houſe in St. *Giles's* in the *Fields*, rendering 30*l.* a year rent; the defendant marries her, and the rent is behind during the coverture; the wife dies, and the plaintiff brings this action upon the indenture againſt the huſband for this rent; and it ſeems the action well lies according to 10 *H.* 6. 11. *a.* But it was adjourned; and afterwards it was adjudged for the plaintiff. Baron and Feme. 1 Danv. Abr. 718. G. p. 1. 1 Lev. 25. 1 Keb. 40, 22.

Boyleſtone *verſus* Radcliffe, *Debt on Obligation.*

Intr. Hill. 1657. Rot. 243.

THE plaintiff declares upon the ſtatute of bankrupts, and on the pleadings the caſe was, That the defendant was indebted to one *Studder* and the plaintiff in a joint obligation; *Studder* becomes a bankrupt, and this debt is aſſigned to the plaintiff by the commiſſioners, to the uſe of the creditors. *Finch* Solicitor General for the plaintiff; this is a good aſſignment; and in this caſe we ſhall inquire, *Firſt*, What intereſt the obligees have? *Secondly*, What power the commiſſioners have? *Thirdly*, If the commiſſioners here have executed their power? *As to the firſt*, The obligation cannot properly be the debt of them both, becauſe Bankrupt. 1 Danv. Abr. 691. p. 5. 1 Lev. 17. 1 Keb. 167.

all

an intereſt cannot be both joint and ſeveral, as *Slingſby's* caſe, in *Coke's* 5 *Rep.* 19. *a.* and therefore they are both poſſeſſed *per my & per tout*; and then one of them being a bankrupt, the commiſſioners have power to aſſign the whole debt due to the bankrupt, and for neceſſity, becauſe the ſtatute of 1 *Jac.* ſays, That the aſſignee ſhall have the ſame remedy as the bankrupt. *Objection.* The debt is not the debt of the bankrupt only, but the debt of another alſo. *Anſwer*, It is alſo the debt of the bankrupt: if the huſband be jointly ſeiſed in the right of his wife, and is * attainted and dies, the wife dies, the iſſue is barred, *Co.* 8. *Rep.* 72. *a. Greenley's* caſe. And by the frank-tenement of the wife, that is intended, that ſhe hath jointly with her huſband, by the ſtatute of 32 *H.* 8. *cap.* 28. So when the huſband loſeth by default land which was the right of his wife, *jus uxoris* is that which ſhe had jointly with her huſband within *Weſtm.* 2. *cap.* 3. there, and this debt is in ſome ſort belonging to the eſtate of *Studder*, for he may diſcharge it. *Secondly*, Aſſignment ought to be favoured, and therefore *Mich.* 23. *Car. Baker* againſt *Edmonds*, *Styles's Rep.* 62. An aſſignee brings an *Indebitatus Aſſumpſit* for 42 *l.* upon an aſſignment of a debt due by contract of 43 *l.* and upon *Non Aſſumpſit*, and a ſpecial verdict, reſolved for the plaintiff; for although in ſtrictneſs of law it is not good, yet in favour of *Creditors* it was held good. *Thirdly*, Whatſoever a bankrupt may forfeit, that may be aſſigned, and there he might have forfeited the whole obligation: and there is a difference betwixt a perſonal chattel in action and in poſſeſſion; for of a joint perſonal chattel in action the king ſhall have all; but of a joint chattel perſonal in poſſeſſion the king ſhall have only the moiety. 8 *E* 4. 4. *a. Plowden* 259. *a. Co.* 3. *Inſt.* 35. *Object.* Perhaps the other obligee hath releaſed. *Reſp.* That is not found in the verdict, and it may be as well ſurmiſed that it was in truſt for the bankrupt. *Wyndham*, If there be two obligees, the one cannot releaſe to the other, becauſe a thing in action, and the ſtatute ſhall not go by the rule of what thing the bankrupt may do, for he cannot aſſign a thing in action. *Twiſden*, The caſe of the forfeiture of *ſelo de ſe*, of a joint debt is by prerogative, but he cannot aſſign the whole, and if he may, then the other may releaſe it. *Secondly*, The ſtatute ſaith, That the aſſignee ſhall have the ſame action. Here the bankrupt cannot have an action without the other. *Foſter*, The queſtion is, If the commiſſioners have power to take away the power of the other obligee to releaſe the debt, and if the aſſignee dies, this ſurvives to the other obligee;

* P. 7.

Godb. 295. pl. 282.

obligee; when the common law and ſtatute-law concur, the common law ſhall be preferred. *Et adjournatur.*

* Jermy *againſt* Sir Arthur Jenny, *Aſſumpſit. Suff.* * P. 8.

THE plaintiff declares, That whereas the defendant the 8*th* of *June* 1655, at *Layſton*, in conſideration that the plaintiff at the ſpecial inſtance and requeſt of the defendant would from thenceforth admit, entertain and board the defendant and his retinue in the houſe and family of the plaintiff, and would find, provide and allow to and for the defendant and his retinue, meat, drink and lodging, and horſe-meat for his horſes whenſoever, and ſo often as ſhould pleaſe the ſaid defendant to repair and come to the dwelling-houſe to the plaintiff, did aſſume and promiſe to pay to plaintiff ſo much money for the ſame, as he ſhould reaſonably deſerve, upon requeſt. The plaintiff avers, That afterwards, *(viz.)* the aforeſaid 8*th* day of *June*, and divers other days and times afterwards, he did admit, entertain and board the defendant and his retinue into the houſe and family of the plaintiff, and did find, provide and allow the defendant and his retinue, meat, drink and lodging, and horſe-meat for his horſes ſeveral times, and whenſoever, and ſo often as it pleaſed the defendant after the ſame 8*th* of *June*, to repair and come to the dwelling-houſe of the plaintiff, and that he doth deſerve 33*l.* 12*s.* and ſo brings his action. The defendant demurs upon this declaration, and ſhews for cauſe, 1. That the plaintiff doth not ſhew the time of notice when the defendant came to his houſe. 2. He doth not ſhew that the defendant after the 8*th* of *June* came to the houſe of the plaintiff. 3. Becauſe the count is ſo defective, inſufficient, incertain, and wants form, &c. *Scroggs* for the defendant. The declaration is incertain, becauſe it doth not appear what days the defendant came to the houſe of the plaintiff, or that the plaintiff found him meat, drink, horſe-meat, &c. and therefore on another action brought this action cannot be pleaded in bar; for he ought to have ſaid, that divers days between the ſaid 8*th* of *June* and the exhibition of the bill he entertained, &c. *Raymond* for the plaintiff. The count is certain enough, for as to the ſhewing that he entertained him from ſuch a day * till ſuch a day, perhaps the truth of the fact was not ſo; and then if he had declared ſo, and the defendant had taken iſſue upon it, the iſſue would have been

Aſſumpſit.

* P. 9.

been found againſt the plaintiff, 2. If it had been divers times betwixt the 8th of *June* and ſuch a day, this had been as uncertain as it is here, for the number of days would not appear, more than here, ſo that the jury may be aſcertained what damages to give. 3. It is ſhewn that all was after the promiſe, and that nothing incurred after the bill; for the bringing of the bill ſhews that he hath not paid; and it ſeems that it cannot be better; for if he ought to have ſhewn all the days, or the time in particular, this would have made the declaration too prolix, and to no purpoſe, for upon the evidence it will appear what the plaintiff hath deſerved; and upon this reaſon it was here adjuged in a caſe of the ſame nature, *Mich.* 1654. *B. R. Pratt* againſt *Banks*, error of judgment in the common bench, where the plaintiff brought an action upon the caſe upon a ſpecial promiſe, and the count was ſuch, That whereas he was an attorney of the common bench, the defendant promiſed, that if he would proſecute a ſuit for him in the ſaid court betwixt him and *A. B.* that he would give to him 3 *s.* 4 *d.* every term; and alſo if he would ſolicit another ſuit for him in chancery, and diſburſe the money that ſhould be due to the officers and counſel, *&c.* that he would repay him, and give to him ſo much for his ſalary; the plaintiff avers that he did proſecute the ſaid ſuit in the *C. B.* and ſolicited for him in Chancery, and *paid divers ſums of money* to ſeveral officers and counſel amounting to ſo much, and that the defendant had not paid him, and judgment was for the plaintiff in *C. B.* and the defendant brought a writ of error, and aſſigned for error that the plaintiff did not ſet forth to whom the fees and money was paid, ſo that if the officers will ſue the defendant again for the ſame money, he cannot plead this action in bar. But reſolved, that it doth not behove him to alledge the particulars, for there is a difference where the action is grounded upon the duty, as in debt upon the contract, as *Gardner* and *Bellingham*'s caſe, *Hob. Rep.* 5. And this is for conciſeneſs of pleading, as in an action upon the ſtatute of ſending knights to parliament, the election ſhall be ſaid *per majorem numerum. Plow. Com. Bulkeley*'s Caſe. 2. The entertainment is at the requeſt of the defendant, and therefore he beſt knows what time he was entertained; and * upon this reaſon it is adjudged, *Hill.* 15 *Car. B. R. Conwey* againſt *Aldre*, *Cro. Car.* 573. In an *Aſſumpſit* the plaintiff declares, That where he at the requeſt of the defendant amended ſuch a boat, and divers other boats of the defendant, he aſſumed to pay to him for his labour and charges

tantum

2 H. 7. 15. Pl. 22.

When the Matters to be pleaded tend to Infiniteneſs and Multiplicity, whereby the Rolls ſhall be incumbered in the length thereof, the Law allows of a General Pleading. Cro. Eliz. 749. Mints *verſus* Bethil. 3 Bulſt. 31. Cryps *verſ.* Bainton. Vide Sid. 18.

* P. 10.

tantum quantum, and avers that he mended one and divers other boats, and that he deſerved ſo much; and this objection was there made, but adjudged that it is good enough, by *Jones*, *Barkeley* and *Croke*; and the reaſon is, becauſe the defendant (at whoſe requeſt the ſaid boats were mended) might well take conuſance what boats they deſired to have amended; and this caſe was well ſcanned, for that Juſtice *Barkeley* doubted of it at firſt, and there were precedents ſearched, and the Secondary there ſaid, that divers precedents were in the caſe, and one was cited by *Croke* himſelf. *Aſſumpſit* was brought by a taylor, and he declared, that where he had made a gown, and divers other ſuits of apparel at the requeſt of the defendant, he promiſed to pay him *tantum quantum*, and in *Cro. James* 370. in *Shepheard* and *Edwards's* caſe, in *Aſſumpſit* for curing a fiſtula, the plaintiff avers, that he ſuch a day, and divers other days and times betwixt ſuch a day and ſuch day, cauſed to be applied medicines, and that he deſerved ſo much; and judgment for the plaintiff; *Noy Rep.* 16. *Tayler* and *Charey*, *Aſſumpſit* to pay 4 *l.* at *Lady-day*, *circiter illud tempus*, and avers, that he paid it not within forty days after; and adjudged for the plaintiff, becauſe it appears that it was not paid when the ſuit was commenced. 3. The entertainment is according to the agreement, which is ſo often as the defendant pleaſed to come, *&c.* which cannot be ſet forth without great prolixity and hazard; and upon debate judgment was given for the plaintiff at another day.

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* Term. Paſch. 13 Car. 2. B. R. * P. 11.

Robins *againſt* Cox and Warwick.

THE caſe was, *Kenne* ſeiſed of land in fee demiſes to the defendants for twenty-one years, rendering rent durings the term, and then grants the rent only (without the reverſion) to the plaintiff and his aſſigns during the term, and the defendants atturn; and for rent behind the plaintiff brings debt, and ſhews this whole matter in his count; and the defendants plead *Nil debent*, and found for the plaintiff. And *Powis* moved in arreſt of judgment, becauſe

Debt.
2 Danv. Abr. 494. p. 16.
1 Lev. 22.
1 Keb. 1, 42, 71, 153, 250.

becauſe debt, as this caſe is, lieth not, becauſe there is no privity betwixt the defendants and the plaintiff, and of a rent-ſeck there is not any remedy without ſeiſin. *Baldwin* for the plaintiff. 1. Rent-ſervice may come to be rent-ſeck, *Lit. ſect.* 225. and here by the attornment there is *quaſi* a new contract between the plaintiffs and the defendants. *Wyndham* Juſtice for the plaintiff, *L.* 5. *E.* 4. 42. Debt lies for an annuity granted for years; and 45 *E.* 3. 8. privity of contract may be transferred; and debt lies upon a leaſe of a fair, and therefore a biſhop may grant a fair for years, but not for life, becauſe debt lies. 2. The law favours remedies. *Twiſden* of the ſame opinion, becauſe the rent was originally ſubject to an action of debt, and therefore, although it is now in another hand, yet the contract remains, as diſtreſs for rent, which is overplus of common right; and *Coke lib.* 4. *Ognel's* caſe, If an annuity be arrear, and the grantee dies, his executors ſhall have debt, becauſe the perſon of the grantor was originally charged, 9 *H.* 7. 16. A ſeignory in fee is granted for years, the grantee ſhall not have debt, becauſe it is out of a fee, but after the term expired he ſhall have debt, 19 *H.* 6, 42. *per Aſcough*, and 44 *El. Bendlows* againſt *Philips*, and *Cro. Eliz.* 895. It was adjudged that grantee of a rent-ſeck ſhall have debt, becauſe the law favours remedies.

Contra H. 24. Eliz. Cro. 3. Rep. *Tanfield's* Caſe.

Mallet Juſtice *contra*, becauſe no privity is betwixt the parties; and of the ſame opinion was *Foſter* Chief Juſtice; * and therefore the court being divided no judgment was given; *mes vide Cro. Eliz.* 637 & 651. *Ards* verſus *Watkins*, where it is adjudged that an action of debt lies.

* P. 12.

Mandamus. 1 Sid. 40. 1 Keb. 5.

A *Mandamus* was prayed for one *Stamp* to reſtore him to be a ſteward of a court-leet and court-baron of the manors of *Stepney* and *Hackney*, of which he was diſplaced in the troubleſome times for his affection to the king, and one *Northey* put in his place; and *York* who moved for it, inſiſted that ſuch writ well lies, becauſe it is an office of adminiſtration of juſtice; and it is more reaſonable than for an uſher of a grammar-ſchool, which was granted in the year 1655. in *Craford's* caſe, and for an alderman, 2 *Bulſt.* 122. in *Skuttleworth's* caſe, for a common council-man, *Stiles Rep.* 32. *Eſtwick's* caſe, for a town-clerk and conſtable, *Noy* 78. *Poph.* 167. for a burgeſs, *Cro. Jac.* 506. *Clark's* caſe. And the court inclined that the writ lay to reſtore one to the ſtewardſhip of a court-leet, but not to a court-baron; but it was adjourned, and precedents directed to be ſearched.

Sir

Sir *Richard Temple* being choſe burgeſs for *Buckingham*, and having a trial at the bar to be had on *Tueſday* before the ſitting of the parliament, moved by Serjeant *Maynard* to have his privilege allowed him, but his motion was denied in regard the parliament were not ſitting, nor to ſit till after the trial had, *(viz.)* the 8*th* of *May*, but the trial did not go on. *Vide Moor Rep.* 340. *pl.* 461. *Fitzherbert's* caſe. Privilege. 1 Sid. 42, 192. 1 Keb. 3, 13, 16, 727.

Rawlins *verſus* Hill.

I *Will indict* Richard Rawlins *at the next ſeſſions, and he ſhall loſe his eſtate, and it ſhall go hard with him for his life: but his eſtate he ſhall ſurely loſe for marking my ſheep.* After verdict for the plaintiff, it was moved in arreſt of judgment; and *Jones* being for the plaintiff ſaid that theſe words *tantamount* to felony; but by *Wyndham* Juſtice, the latter words mitigate all, and therefore judgment was ſtayed until, *&c.* Words. 1 Keb. 6, 17.

* Johnſon *verſus* Samworth. * P. 13.

THE plaintiff counts, that the defendant in conſideration that the plaintiff would give to him 5*s.* he would give to the plaintiff 40*s.* if he ever played at a game called *Even and Odd* for money or wine, and avers that he gave to him 5*s.* and that the defendant played at the ſaid game ſuch a day, *unde actio accrevit.* Upon *Non Aſſumpſit*, and verdict for the plaintiff, it was moved in arreſt of judgment, that there was not any ſuch play; but it was allowed; and the court approved of the conſideration to reſtrain young men from gaming; and judgment was given for the plaintiff. Aſſumpſit. 1 Keb. 9.

Memorandum, Thomas Howard (brother to the earl of *Carliſle)* and his two ſervants, *Michael Naylor* and *John Mills*, were indicted for murder, for the killing one *Proby* ſervant of a horſe-courſer at *St. Giles* in the *Fields*, and found guilty of the murder, and attainted; and now on this 4*th* day of *April* they were brought to the bar to ſhew a pardon which they had obtained, and ſhew cauſe why they ſhould not be executed; and they pleaded the pardon, which was read, and it (as I well obſerved) recited all the proceedings Pardon. 1 Sid. 4, 4. 1 Keb. 3, 19, 108.

ings upon the indictment, and then the king was informed that no evidence was given that there was any malice prepenſe in them in other manner than by conſtruction and implication of law, and for that the king pardoned the killing and felony, *&c.* but no word of murder was in it but by deſcription; and the court were troubled to hear ſuch a ſuggeſtion in the patent, becauſe they knew the contrary to be true, and therefore they ſaid, that upon ſuch a pardon a *Scire facias* might be brought ſeven years hence, and they might be hanged notwithſtanding this pardon, and therefore they adviſed Mr. *Howard* to procure a better pardon; and *Wyndham* Juſtice ſaid, That the ſuggeſtion of the pardon might have been grounded on the merits of the priſoners, *&c.* But upon this charter the priſoners have not produced any writ of allowance, and therefore the pardon was not allowed; but their execution reſpited till another day, at which day they produced a patent without any ſuggeſtion at all, and a writ of allowance, but the date was miſtaken, and did not agree with the writ, and therefore execution was reſpited over.

* P. 14.

† Godlington *verſus* Lee.

Debt. Debt lies on a judgment given on the *Sci. fac.* againſt the bail. Inſt. 236. Upon the Recognizance. 1 Roll. 600. pl. 7, 8.

Vide on Preſident, Trin. 8. Jac. Rot. 805. 1 Brown. 65. Booth *againſt* Davenant. Winch 61. Sparrow *verſ.* Sowgate, Hetley 129.

THE caſe was, The defendant became bail in this court for another, and judgment was given againſt the principal, and now the plaintiff brings debt upon this recognizance; and *Allen* moved for an imparlance, becauſe debt lieth not in ſuch caſe, becauſe by this means the bail ſhall be ouſted of his plea of no *capias* filed againſt the principal, and alſo abridged of his time of bringing the principal, which he hath until the ſecond *Scire facias* returned, for now immediately he ſhall be liable to the debt; and although it was objected, that there had been precedents of ſuch action, and *Bendlows* in the time of *H.* 8. makes mention of it, he ſaid thoſe precedents paſſed *ſub ſilentio*, and therefore they are not to be regarded; and for theſe reaſons the court granted an imparlance that ſuch action lies not; *quod nota.*

Barnard

Barnard *verſus* Ewens.

DEBT upon 2 *E.* 6. for tithes. The defendant pleads an agreement between the plaintiff and him for three years, and doth not alledge this to be by deed, and iſſue upon it, and found for the defendant; and *Powis* moved for the plaintiff to have a repleader, becauſe the iſſue is not good; but reſolved by the whole court, although it is not ſuch an agreement which may paſs the right, yet it is a good agreement within the ſtatute to bar the plaintiff in his action of debt; *Yelv.* 94. *Hawks* verſus *Brathwick* 131. accordingly.

Tithes. Contra Hob. 176. Cro. Jac. 137. Hawles *verſus* Bayfield. 2 Danv. Abr. 621. p. 7. 1 Lev. 24. 1 Keb. 5, 21.

Gliniſter *verſus* Audley.

DEBT upon an obligation; the defendant demands oyer of the condition, which was to perform covenants, one of which was, That the defendant covenanted that he was ſeiſed of an indefeaſible eſtate in fee-ſimple, and the defendant pleads covenants performed; the plaintiff replies, That he was not ſeiſed of an indefeaſible eſtate in fee-ſimple, and the defendant demurs generally, becauſe he ſuppoſed that the plaintiff ought to have ſhewn of what eſtate the defendant was ſeiſed, in regard he had departed with all his writings * concerning the land in preſumption of law, and therefore the plaintiff well knew the title; and it is not like to *Bradſhaw*'s caſe, becauſe there the covenant was with the leſſee for years, who had not the writings. But reſolved the breach was well aſſigned according to the words of the covenant; and judgment was given for the plaintiff.

Debt. 1 Keb. 58.

* P. 15.

Graves *verſus* Sawcer.

IN an action upon the caſe, the plaintiff declares that he was owner of a ſixteenth part of a ſhip, and the defendant was owner of another ſixteenth part of the ſame ſhip, and that the defendant fraudulently and deceitfully carried the ſaid ſhip *ad loca tranſmarina*, and diſpoſed of her to his own uſe, by which the plaintiff hath loſt his ſaid ſixteenth part, to his damage. On not guilty pleaded, and verdict for

Caſe. 1 Lev. 29. 1 Keb. 38.

for the plaintiff, It was moved in arreſt of judgment, that this action doth not lie; for although it be found to be deceptive, yet this does not help it, if the action doth not lie on the ſubject matter; and here they are tenants in common of the ſhip; and *Littleton* ſaith, That between tenants in common there is no remedy; and there cannot be any fraud between tenants in common, becauſe the law ſuppoſes a truſt and confidence betwixt them; and upon theſe reaſons judgment was given *quod querens nil capiat per Billam.* Vide *Noy* 14. *Croſſe* verſus *Abbot*, *M.* 11. *H.* 4. 13. *a. pl.* 29.

Smith *verſus* Warner. Treſpaſs.

Damages. 1 Keb. 49, 61. Herne's Ent. 320.

TRESPASS for taking goods: the plaintiff counts *de una Satagine*, *Anglice* a frying-pan: And after verdict for the plaintiff, It was moved in arreſt of judgment, becauſe it ought to be *Sartagine*, for *Satago* ſignifies nothing; and adjudged for the plaintiff; for if *Satago* ſignify nothing, then no damages were given for it, and the difference was taken where the word ſignifies another thing, there it is ill, but where it is inſignificant it doth not vitiate.

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* P. 16.

Uſher *verſus* Buſhnel.

Treſpaſs. If they were taken in the Warren or Wood of the Plaintiff, they might be his Pheaſants. Cro. Car. 553. Child *verſus* Greenhill. 1 Sid. 39. 1 Keb. 53, 60.

TRESPASS *vi & armis quare Phaſianos ſuas & Perdices ſuas cepit*; and not guilty found for the plaintiff; and moved in arreſt of judgment, becauſe they are *feræ naturæ*, and therefore there cannot be any property in them: But adjudged for the plaintiff, becauſe after verdict they ſhall be preſumed dead, and then a property may be in them.

Wynne *verſus* Lloyd.

ERROR to reverſe a common recovery in *Angleſey*, the errors aſſigned were in the writ of ſummons, and in the *dedimus poteſtatem*, and upon this a *Scire facias* iſſues againſt the demandant in the recovery, who pleads *In nullo eſt erratum*, and then upon ſuggeſtion that *Wynne* was concerned, a *Scire facias* iſſued to him, and he pleads that another had lands comprized in the ſaid recovery, who is not named in the ſaid writ of error, judgment of the writ, and on this plea the plaintiff demurred. *Allen* for the plaintiff; this plea is not good, becauſe the proceſs had been good without naming this party, for the ter-tenant only is to be there of neceſſity, *Dyer* 321. *a.* and he ſhall only plead the thing, for which judgment ſhall not be reverſed, and not in abatement of the writ of error, 30 *H.* 6. 2. b. *per Forteſcüe.* 2*dly.* This plea is not to any purpoſe, for the court may proceed without the other ter-tenants. 3*dly.* Such plea is againſt the return of the ſheriff expreſsly, for he hath returned the ter-tenants. 4*thly.* This plea is ill, becauſe he pleads that *A.* is ter-tenant of divers, and doth not ſay what lands.

Error. Poſtea 55, 70, 96, 134. 3 Danv. Abr. 49. p. 7. 1 Lev. 72, 130, 146. 1 Keb. 351, 388, 459, 717, 748, 809, 914. 1 Sid. 213. Vid. Moor 524. pl. 693. Clark *verſus* Hardwick.

Williams contra. Theſe queſtions are inquirable; 1*ſt.* If a *Scire facias* be neceſſary againſt the ter-tenants in this * caſe. 2. If every ter-tenant ought to be returned. 3. If another ter-tenant that is not returned may be ſuggeſted at the bar. * P. 17.

As to the Firſt. A *Scire facias* in this caſe is neceſſary againſt the ter-tenants, becauſe none gains or loſes but they, *Dyer* 321. before; and all the precedents mention this, *Cro. Jac.* 392. *Harbert* verſus *Binion*, 160. *Champernoon* againſt *Godolphin*, 41 *Eliz.* *Lee* verſus *Holland*, and *Row* verſus *Eveley*, and *Owen* 157. *Carew* verſus *Warren*, 21 *E.* 3. 56. *Bridgman* 70. *Holland* verſus *Jackſon.*

To the Second. A *Scire facias* being awarded generally, every one ought to be ſummoned.

Object. The party ſhall not be concluded, although he be not ſummoned.

Anſw. He ſhall not be concluded if he come in due time; but the diſcretion of the court will ſupport a common recovery, and here if this ter-tenant doth not come, he ſhall be concluded, for it is not like to *Dyer* 321.

To

To the Third. It now appearing to the court that there is such a ter-tenant, a *Scire facias* ought to issue against him, *Fitz. Scire facias* 38. 21 *E.* 3. 56. and it was adjourned, *post.*

Nuttal *versus* Page.

Words.
1 Keb. 50, 56.

NUTTAL that was *Solomon Smith*'s clerk is a knave, and rogue, and I will prove it, and he is in *Newgate*, and is to be hanged for counterfeiting the king's hand and seal; adjudged for the plaintiff.

Windsor *versus* Seywell. *Ejectment.*

Outlawry.
1 Keb. 57, 74, 76.
1 Lev. 33.

ON a special verdict, the case was, *A.* outlawed in a personal action levies a fine, and the king seizeth the land in the hands of the conusee, and whether such seizure be good or not, was the question; and resolved, That if the seizure was before the fine levied, then the king may well retain against the conusee: but if the fine was levied before the seizure, the conusee may well take; and the book of 21 *H.* 7. *f.* 7. was denied, that the king cannot dispose of the land it self of a person outlawed, for the course of Exchequer is against that book. *Vide Stamf. Prerogat.* 57. and 24 *Car. Pickering*'s case in the *Exchequer*. *T.* 9 *H.* 6. 21. *a. pl.* 15. *per Babington*, 1 *Leon.* 63. *pl.* 84. *Cro. Eliz.* 270. *Ognel*'s case, *H.* 15 *H.* 7. 2. *pl.* 4.

* P. 18.

* Tippin *and* Grovet.

Rent.
1 Keb. 62.

DEBT for rent brought by executors, the plaintiffs count, that their testator was seized for another's life of certain tithes, and demised them to the defendant for years, rendering rent, and for 400*l.* arrear they bring debt; and on demurrer on this declaration, *Jones* argued it is a rent, and that the executors shall not have this rent, because it appertains to the reversion, for it is a rent although not in point of remedy. *Cro. Jac.* 112 & 453.

Allen contra. Debt lies upon the contract, which goes to the executors. But he perceiving the opinion of the court to be against him, prayed a discontinuance, which was granted him.

Black

Black *verſus* Mole. *Replevin.*

A Copyholder makes a leaſe for years rendering rent, and then ſurrenders two parts of the reverſion, and he to whoſe uſe the ſurrender was made diſtrains for the two parts of the rent, and mentions not any attornment of the tenant in his avowry, nor any notice; and upon this avowry the plaintiff demurs; and adjudged that attornment and notice are not neceſſary, becauſe the ſurrender is a thing notorious of it ſelf. Attornment. 1 Danv. Abr. 614. p. 8. 1 Lev. 40. 1 Keb. 93.

Andrews *verſus* Showell.

THE Caſe was, The defendant gave a warrant of attorney to one to confeſs judgment in debt to the plaintiff by *non ſum informatus* at eight a clock in the morning, and at ten a clock before the judgment ſigned by the Secondary, the defendant dies, and now the executors of the defendant move to ſet aſide this judgment; but reſolved it was well obtained, it being for a good debt; *quod nota.* Attorney.

* Term. Mich. 13 Car. 2. B. R.

Sir *Robert Foſter*, Chief Juſtice.
Sir *Thomas Mallet*,
Sir *Thomas Twiſden*,
Sir *Wadham Wyndham*, } Juſtices.

Memorandum, The laſt vacation Serjeant *Glanvil*, who was the King's firſt Serjeant, died.

Day *verſus* Guilford. *Ejectment.*

Hill. 12 Car. 2. Rot. 952.

Audita Querela. 1 Danv. Abr. 630. p. 15, 633. p. 12. 1 Keb. 112, 141. 1 Sid. 54. 1 Lev. 41.

ON a ſpecial verdict the jury found *Edward Guilford*, father of the defendant, was ſeized of the lands in queſtion for life, the remainder to the defendant in tail; the father enters into a recognizance in Chancery, to the leſſor of the plaintiff, and dies, the leſſor ſues a *Scire facias* upon the ſame recognizance, the ſheriff returns the defendant heir and ter-tenant, *& quod Scire fecit* the defendant, and he makes default and doth not plead; and judgment is given, that the conuſee have execution, who leaſes to the plaintiff.

Wild Serjeant for the plaintiff, Here by the judgment upon default in the *Scire facias* the defendant is bound until he reverſes it either by writ of error, or relieves himſelf by 1 Danv. Abr. 671. B. p. 1. 3 Danv. Abr. 42. p. 2. Styl. 281, 288. *Audita Querela*, *F. N. B.* 104. *b. Kel.* 25. *a. Paſch.* 1652. *B. R. Barcock* verſus *Thompſon*, *Styles's Rep.* 323. If judgment be given againſt the bail upon two *Nichils*, and no *capias* is returned againſt the principal, although the bail cannot reverſe the judgment by error, yet he may have an *Audita Querela*, but not upon a *Scire feci* returned. *Vide Mich.* 1657. *B. R. Kilburne* verſus *Rack*, *Ejectment*, *B. R. Intr. Trin.* 1656. *Rot.* 876.

* *Wyndham* for the defendant, It ſeems this caſe differs from the caſes put, becauſe here execution is ſued upon another eſtate than the conuſor had; as if the ſheriff return *J. S.* ter-tenant, who never had any thing in the ſaid land

land of the conuſor, yet *J. S.* may maintain an *Ejectment*, *Mich.* 6. *R.* 2. *Fitz. Aſſiſe* 69. And here the conuſor had only an eſtate for life, and not the eſtate of which the defendant was ſeized at the time of the action.

Twiſden for the plaintiff, *Vigilantibus & non dormientibus jura ſubveniunt*, the defendant ought to have pleaded when he had warning, and now he ſhall not falſify his recovery, and there is a difference when the conuſor is tenant in tail, and when for life; and now the defendant is eſtopped by the return of the ſheriff; and this differs from the two *Nichils*.

Mallet for the defendant, *Res inter alios actæ nemini nocere debent*.

Foſter for the plaintiff, Here is a wilful contempt in the defendant, for that he came not in on the *Scire feci*. It was adjourned, and after judgment was given for the plaintiff.

Mich. 13 Car. 2. B. R.

He is a baſe fellow, and I will queſtion him ere long, for that he would have taken away the King's life. Verdict for the plaintiff. And *Jones* moved in arreſt of judgment, but it ſeemed to the court that the words were actionable, becauſe in caſe of the king the intent is puniſhable; but adjourned.

Urſula Auſten *verſus* John Mander.

Error of a Judgment in Oakhampton *in* Devon.

THE errors taken by *Alleyn* were, 1*ſt*, The *Venire fac.* is, therefore it is commanded by the court that he make to come twelve, *&c.* by whom, *&c.* and who, *&c.* in a brief manner, as in the courts at *Weſtminſter*, where it ought to be at large in all inferior juriſdictions. *Anſw.* In the caſe of *Oſborne* and *Gregory* of a judgment in *Exceſter*, this exception was moved and diſallowed. 2*dly*, He doth not ſay that proceſs of *Diſtringas* is awarded by the court, but as before, *&c.* *Anſw.* It is good becauſe it refers to the matter before. 3*dly*, The judgment is *quod recuperet*, and alſo 39*s.* *pro miſis & cuſtagiis de incremento*, and doth * not ſay *circa ſectam ſuam*, and it may be that the increaſe was for ſickneſs or battery, or ſome other collateral matter. *Anſw.* The precedents are all ſo at *Weſtminſter*, and it ſhall not be preſumed for any other thing than for the ſaid Error. 1 Keb. 113. * P. 21.

ſuit; and *Twiſden* ſaid, That the reaſon, for which nothing out of inferior courts ſhall be taken by intendment, is, becauſe there they only enter ſhort notes of their proceedings, and when they are to certify, the attornies here draw the records at large; and judgment was affirmed.

Palmer *verſus* Stavick. *Replevin.*

Eſtoppel. Paſ. 1652. B. R. Carter *verſus* Wicker, Rot. 448. 3 Danv. Abr. 273. p. 56. 1 Keb. 95, 113. 1 Sid. 44. 2 Lev. 43.

THE defendant made conuſance for a rent-charge due *Anno Dom.* 1658. The plaintiff pleads, That the defendant upon another *Replevin* at another time, together with *A. B.* made conuſance upon the ſaid plaintiff for rent arrear in the year 1660, and demands judgment, if againſt the ſaid avowry he ſhall make conuſance for rent due before, and relied upon the ſaid eſtoppel, and the defendant demurred. *Jones* for the plaintiff, It ſeems the defendant is eſtopped by the avowry as by an acquittance, and *a fortiori* becauſe it is matter of record, and that an acquittance is a bar of arrearages, the books are plain, *Dyer* 271. *a.* 3 *Coke* 65. *b. Pennant*'s caſe, 11 *H.* 4. 55. *a.* But the truth is *Fitz. Bar.* 79. is againſt me; but that caſe I deny, and alſo the caſe of the annuity. *Obj.* The avowry here is not betwixt the ſame parties. *Anſw.* They are the ſame defendants, and the ſame parties in whoſe rights the diſtreſs is made; and if this ſhall not be the ſame action, there will be infinite veration.

Allen for the defendant, Here is not any eſtoppel, becauſe not between the ſame parties, and in truth the duty remains, and the bailiff cannot conclude his maſter.

Wyndham is clear for the defendant; and the opinion of *Fitz. Bar.* by three Juſtices is good, becauſe an annuity may be paid without acquittance.

Twiſden of the ſame opinion.

Mallet for the plaintiff, becauſe an avowry is a thing upon record, and more than an acquittance; but judgment was given for the defendant.

* P. 22.

* Granger *verſus* Hemborough. *Debt.*

Departure. 1 Sid. 77. 2 Keb. 115, 178, 185, 230, 283.

DEBT upon an obligation of 50*l.* to perform covenants in an indenture, and one is, That the defendant pay 12*l.* a year for a meſſuage to him demiſed quarterly, at four feaſts. The defendant pleads performance of all covenants. The plaintiff aſſigns for breach, that he did not pay 3*l.* one quarter's rent. The defendant rejoins, that

that before the ſaid 3*l.* was due, the plaintiff entered upon him, and expelled him. The plaintiff demurs.

Baldwin for the plaintiff, The rejoinder is a departure, for he might have pleaded this matter in his bar, as *Dyer* 291. *Fitz. Williams*'s caſe. In a *Formedon* the tenant pleads a fine, the demandant replies, *quod partes finis nihil habuerunt*, but that ſuch a one was ſeiſed; the tenant rejoins that the party that levied the fine was ſeiſed in uſe; and reſolved a departure, for he alledges before a ſeiſin at common law, and now would make this good by the ſtatute.

Jones for the defendant, This rejoinder is a corroboration of the bar, and he ought not to have pleaded this thing at the firſt, becauſe there are ſeveral covenants, and he could not know in which of them he would have aſſigned the breach; and there is a difference where the condition is to perform all covenants compriſed, and where it is all covenants and payments, as *Chapman*'s caſe is, *Cro. Car.* 76. there the defendant pleaded performance of all; the plaintiff aſſigned a breach in non-payment of the rent; the defendant cannot rejoin, that it was not demanded, becauſe it is a departure.

Wyndham, It is a departure, and it is not like to the caſe of demand, becauſe it is a diſcharge.

Twiſden agreed with *Wyndham*, Where the defendant pleads a general plea, he ſhall not make this good after by a particular thing in the rejoinder; but it was adjourned, and after ruled to be a departure, and judgment given for the plaintiff. *Vide Cro. Eliz.* 828. *Specot* and *Sheers*, a caſe directly in point. 2 Danv. Ab. 101. p. 11. Hutt. 91. Moor 636.

* Harris *verſus* ——— * P. 23.

THOU *art a traytor and a rebel*; the defendant juſtifies, that 28 *Sept.* 1659, the plaintiff was a ſoldier under one captain *Ceely*, againſt the king: plaintiff demurs, preſuming the general pardon had reſtored him to his good fame, as *Hob.* 81. *Cuddington* againſt *Wilkins*; but adjudged for the defendant, becauſe the plaintiff ought to have ſhewn that he was not one of the perſons there excepted. Words. 1 Keb. 115.

Nicholſon

Nicholſon *verſus* Sherman.

Caſe for a Legacy.

Caſe.
1 Danv. Abr. 207. p. 4.
1 Sid. 45.
1 Keb. 116.

THE plaintiff declares, that *James Glaſſebrook* made his will, and deviſed to the plaintiff 100*l.* and that his executors ſhould double the ſaid 100*l.* and for the 200*l.* he brings this action, and avers the defendant hath aſſets beyond debts; and the defendant demurs.

Jones for the plaintiff. Here are two points. 1. If the doubling the 100*l.* be a deviſe, or that it ſhall be only at the diſcretion of the executors; and it ſeems clear that it is a deviſe, and the other part doth not oppoſe it. 2. If an action upon the caſe lies for a legacy; and held that it does. 1ſt, I will not inſiſt whether there be any remedy for a legacy at common law. *Glanvil, lib.* 7. *chap.* 6, 7. 2*dly*, An action of the caſe lies againſt an executor upon a breach of truſt, as it lies againſt a ſhepherd for not regarding his charge. And firſt, the law takes notice of legacies to collateral purpoſes, as a promiſe to forbear a legacy is a good conſideration to ground an *Aſſumpſit*; and in an action againſt an executor in his own wrong, it is a good plea to ſay that he hath paid all in legacies; and an action upon the caſe lies for a *Tort*, as for not performing a contract, *Cro. Jac.* 544. *Healy* verſus *Duntley*. Here is a breach of truſt, becauſe the executor takes upon him to perform the will of the plaintiff. *Object.* Legacies cannot be ſued for here in *ſpecie*, and it was never known before. *Anſw.* The action of *Indebitatus Aſſumpſit* was a rare action before *Slade*'s caſe.

† Danv. Ab. 198. p. 6.

* R. 24.

* *Wyld contra.* An action doth not lie for a legacy, becauſe it is a teſtamentary thing, and one of the principal, as appears by the writ of prohibition, *Regiſter* 38. and the ſame argument that *Littleton* uſes for the ſtatute of *Merton* may be here uſed, that never ſuch an action had been uſed; and the rule of the civil law is not current in *Weſtminſter-Hall*, *Boni Judicis eſt ampliare juriſdictionem*; and true it is, the common law takes notice of a legacy; but ſo, as it is a teſtamentary thing, and as to the *Indebitatus Aſſumpſit* which was ſo rare, yet it was within the juriſdiction of the common law; and although of late time ſuch actions have been uſed, yet this was leſt there ſhould be a failure of juſtice when there was no eccleſiaſtical court; and ſo it was adjudged in *Harwood* and *Peytoe*'s caſe, that an *Elegit* might be executed in the glebe land of a parſon; but if it were to be adjudged now, it would not be ſo ruled as it was then.

Hard. 65.
Styl. 161, 168.

2*dly*,

2dly, If it be a breach of truſt, then it is a perſonal tort, *& moritur cum perſona*, as an executor ſhall not be reſponſible for an eſcape ſuffered by the teſtator. *Dyer* 322. *a.*

Wyndham, The action doth not lie, for the conuſance of a legacy doth not appertain to the common law, for that by our law a man cannot give any thing after his death, becauſe *poſt mortem tunc tua non ſunt*, and there is not any ſuch duty at the common law as a legacy; and an action of the caſe doth not lie for every *Tort*, for it doth not lie for non-payment of rent, and a penſion raiſed by the conſtitution of the ordinary is not ſuable here.

Twiſden, It was adjudged here, that a legacy iſſuable out of land is ſuable here, and originally legacies were ſuable in the county court; and *Raſtal Entries* 301. *a. Title Execut. in Action* 5. Debt is brought againſt an executor for a legacy, but a demurrer is on the count, and no judgment given; but that which moves me againſt this action is, that by this way an action upon the caſe will be brought for every thing ſuable in the eccleſiaſtical court.

Mallet and *Foſter* for the defendant. And judgment was given for the defendant, *niſi*, *&c.*

* Eden *verſus* Chalkhall. *Ejectment.* Middleſex *for Lands in* Southmyms. * P. 25.

UPON evidence in a trial at bar, the caſe was, That *Henry Crawley* 6 *Nov.* 1645, conveys by indenture to *Web* and *Taylor* in fee, and levies a fine accordingly without any conſideration, and 13 *March* 1645, he covenants to ſtand ſeiſed to the uſe of himſelf for life, the remainder to his firſt ſon in tail, who is the leſſor of the plaintiff and levies a fine accordingly; the 28 *March* 1653, *Henry Crawley* and his wife, with *Web* and *Taylor* join in a voluntary conveyance by fine to *William Godfrey* and his heirs; *Henry Crawley* having iſſue the leſſor of the plaintiff dies; *William Godfrey* makes his will, and of this makes the lord *Windſor* and the lord *Caſtleton* his executors, and deviſes the lands to be ſold by them; they the 19 *March* 1657, ſell to *Skinner* and *Skinner* for 2000*l.* who convey to Sir *Thomas Bide* and his heirs. And it was reſolved by the court, That although *Skinner* and *Skinner* paid a valuable conſideration, yet the eſtate to *Godfrey* being voluntary, if the conveyance of 6 *Nov.* 1645, was forged, the plaintiff hath good title; but the jury found the firſt conveyance good, and found for the defendant. 1 Keb. 40, 117.

Elizabeth

Elizabeth Robinſon *againſt* Margaret Amps.

Covenant.

Condition. 2 Danv. Abr. 44. p. 10. 79. p. 1. 1 Keb. 103, 118. 1 Sid. 48.

THE plaintiff declares, That the defendant by indenture dated 1659, reciting, that there was a leaſe made to the defendant, and a recognizance acknowledged by *Humfry Robinſon* to the defendant, bearing date with the ſaid indenture, the defendant covenanted that if *Humfry Robinſon* pay to the defendant ſuch a ſum 24 *June* 1660, *&c.* that then the ſaid recognizance ſhall be void, and then the defendant, his executors and adminiſtrators, *&c.* at the coſts of the plaintiff will regrant the ſaid indenture, and redeliver the ſaid recognizance to be cancelled and vacated, and the plaintiff aſſigns for breach, that 21 *October* 1659, the defendant proſecuted an extent upon this recognizance. The defendant pleads, that he did not * proſecute upon this recognizance, and iſſue upon it, and found for the plaintiff; and *Jones* moved in arreſt of judgment, that here is only an implied breach, for the recognizance may be delivered up, and yet the recognizance be proſecuted.

* P. 26.

Allen for the plaintiff. 1. Where a covenant terminates in it ſelf, it is properly a covenant but a defeazance, *Plow.* 138. *a.* But here is an engagement to deliver up the ſaid recognizance. 2. Here is a preſent breach, for when he extends, the plaintiff ſhall not be compelled to ſtay till a farther day, when the extent is a breach of the covenant, as 5 *Co.* 22. Sir *Anthony Maine*'s caſe.

Wyndham. A covenant to do a preſent act is not properly a covenant; as to ſtand ſeiſed. And as to the ſecond, the defendant hath diſabled himſelf to deliver up the recognizance, as feoffee on condition takes wife, *&c.* and the breach here is well aſſigned.

Twiſden to the ſame intent, and ſo the other judges; and judgment was given for the plaintiff, *niſi*, *&c.*

Edſar *verſus* Smart.

Execution. 3 Danv. Abr. 311. p. 5. 334. p. 5. 1 Lev. 30. 1 Keb. 92, 132.

JUDGMENT in debt is had againſt two, and one dies, and the plaintiff brings a *Scire facias* againſt the ſurvivor, and recites the death of the other, and prays execution againſt the ſurvivor; the defendant pleads, that he which died had an heir, who is in full life, and demands judgment if execution, &c. plaintiff demurs. *Wynnington* for the plaintiff: It ſeems to me that the execution is well againſt

againſt the ſurvivor: And as to that, 1. We ought to inquire what the common law is. 2 What alteration the ſtatute of *Weſtm.* 2. hath made. As to the firſt, at common law, If judgment had been given againſt two, and the one dies, the charge ſurvives, Sir *William Herbert*'s caſe. Hob. 25. To the ſecond, The ſtatute of *Weſtm.* 2. which gives the *Elegit*, doth not take away the privilege of the plaintiff, but that he may have execution at the common law if he will, for the words of the ſtatute are, *ſit in Electione*, and this ſtatute was made only for the benefit of the plaintiff. *Obj.* And as to the 29 of aſſizes, *Longford*'s caſe, I anſwer, the ſame caſe is reported 29 *E.* 3. 39. and there by *Thorpe* the lands are equally liable, and by that it may be eaſily collected, they intended execution only upon the lands, and not a perſonal charge; but here may be a perſonal charge, and * that is the difference; for when the charge is upon the lands then it doth not ſurvive, but when it is perſonal it ſhall; and for authorities direct in the point, *vide* 3 *E.* 3. 11. *pl.* 37. 1 *E.* 3. 13. *p.* 41. * P. 27.

Wyndham Juſtice. The books of 1 and 3 *E.* 3. are direct in the point, and the reaſon why this execution ſhall be againſt the ſurvivor, is, becauſe the plaintiff may take a *Fieri facias* if he will, and perhaps he will not charge the land. Yelv. 209. *cont.*

Twiſden of the ſame opinion; and if upon this *Scire fac.* the plaintiff takes an *Elegit*, the defendant, may have an *Audita Querela*; or, 2*dly*, He may ſuggeſt this matter upon the return of the *Elegit* and have a *Superſedeas*, *F. N. B.* 166. 44 *E.* 3. 10. 4 *E.* 4. 39. 7 *H.* 4. 30. and judgment was given for the plaintiff, *niſi*, &c. *Vide Poſc.* 1 *H.* 5. 5. *a. pl.* 6.

Richard Capenhurſt *verſus* Capenhurſt.

DEBT upon an obligation to perform covenants; the caſe was ſuch, *A.* poſſeſſed of a term for years grants ſo much of the term, that ſhall be unexpired at the time of his death; the grantee aſſigns, and covenants that the aſſignee ſhall enjoy againſt all perſons, and the plaintiff aſſigns a breach, and iſſue upon it, and verdict for the plaintiff; and *Bigland* moved in arreſt of judgment, that the action did not lie, becauſe the original grant being void for the incertainty, as in the rector of *Chedington*'s caſe, the covenants are void alſo, becauſe the bond depends on the covenants, and the covenants depend on the leaſe; and he cited *Yelv. fol.* 18. *Soprani* and *Skurro*. Covenant. 2 Danv. Abr. 228. p. 5. 3 Danv. Abr. 209. p. 1. 1 Lev. 45. 1 Keb. 130, 164, 183.

Jones

Jones for the plaintiff. The term is not well aſſigned, but here is a covenant which ſtands diſtinct by it ſelf, and if there be not any covenant, then the obligation is ſingle.

Wyndham Juſtice. If the deed is void, no covenant in it ſhall bind. And judgment was ſtayed; but it was after adjudged for the defendant. *Vide Owen Rep.* 136. *Waller* againſt the dean and chapter of *Norwich*, that the covenant ſhall bind, though the deed be void.

* P. 28. * Plunket *verſus* Holmes.

Deviſe.
2 Danv. Ab. 519. p. 15.
Eq. Ab. 188. p. 12.
1 Lev. 11.
1 Sid. 47.
1 Keb. 29, 119.

THE wife having two ſons by divers huſbands (which were dead) and being ſeiſed of the lands in queſtion, in fee, deviſed them to *Thomas* her ſon *for* the term of his natural life, and if he die *without iſſue* of his body *living* at the time of *his death*, then to *Leonard* another of her ſons, and his heirs for ever; but if *Thomas* have *iſſue living* at the time of *his death*, then the fee ſhall remain to the *right heirs of Thomas for ever*; the woman died, *Thomas* entered and ſuffered a common recovery, and dies without iſſue, the recoveror made a leaſe to the defendant, *Leonard* entered upon him, and made a leaſe to the plaintiff; *Et ſi, &c.*

Allen for the plaintiff. The points which I ſhall raiſe here are, 1*ſt*, What eſtate *Thomas* and *Leonard* have by the will. 2*dly*, What operation the recovery had upon the eſtate of *Leonard*. *As to the firſt*, There is not any eſtate tail to *Thomas*, but another eſtate, for the limitation to *Leonard* is not upon failure of iſſue of *Thomas*, but upon failure of iſſue living at his death. 2*dly*, The contingency is repeated in the ſecond limitation, and this point hath been agreed in the argument of this caſe before; but now I ſhall conſider whether *Thomas* hath an eſtate for life, or a fee determinable. And firſt, I hold he hath a fee determinable. 2*dly*, *Leonard* takes by executory deviſe, and not by way of contingent remainder.

When a particular eſtate is limited, and the inheritance paſſes out of the donor, this is a contingent remainder, and in abeyance, *Plow.* 35. *a.* But if the fee be veſted in any perſon, and to be veſted in another upon a contingency; this is an executory deviſe; and here *Thomas* had a fee-ſimple immediately, becauſe firſt he is heir at law to the deviſor; and if there had not been any deviſe to *Thomas*, but if *Thomas* had died, *Leonard* there would have been his heir.

Object.

Object. Here is an expreſs deviſe to *Thomas* for life, and the remainder here ſhall be in abeyance, as in *Archer*'s caſe.

Anſw. In *Archer*'s caſe, *Robert* had not only an eſtate for life, but alſo a reverſion in fee-ſimple expectant upon an eſtate-tail, and therefore the caſe is not well reported in 1 *Co.* 66. *b.* But the remainder there was of neceſſity contingent, becauſe it is only a deviſe in tail, and not a gift of all the eſtate; and in our caſe the queſtion is upon the limitation of the fee-ſimple. 2*dly*, *Thomas* hath the fee-ſimple, becauſe although it be given to him for life only, yet after it is limited to his right heirs; and the words, If *Thomas* hath iſſue, then, *&c.* are only declaratory. 3*dly*, This is the meaning of the will; for the deviſor took care for the younger ſon when the eldeſt died without iſſue, as appears by the diſpoſition of the writings by him. 4*thly*, If the will be capable of divers interpretations, that ſhall ſtand which conſiſts with the meaning of the parties, and that is, that *Thomas* ſhall have fee. * P. 29.

2*dly*, As to the operation of this common recovery, it ſeems to me that this executory deviſe is not barred by it. The reaſon of a bar in a common recovery, is the intended recompence; therefore if tenant in tail make a feoffment in fee, and the feoffee ſuffer a common recovery, this does not bar the eſtate-tail, becauſe the recompence cannot go to the eſtate-tail; but if the tenant in tail be vouched, then it is a bar, 3 *Co.* 3. *a.* the marquis of *Wincheſter*'s caſe, and *fol.* 6. *a. Cuppledike*'s caſe. Here the recompence in value cannot go to *Leonard*, becauſe the one eſtate hath no dependance upon the other, for *Leonard* hath no eſtate in him, but in contingency. 2. Recompence in value cannot ſerve a fee after a fee.

3*dly*, *Leonard* cannot falſify this recovery, becauſe he is *quaſi* a ſtranger to it, and there is not any privity of eſtate betwixt *Thomas* and him; and the very ſame point is reſolved in *Pell* and *Brown*'s caſe, *Cro. Jac.* 590. And if *Leonard* that hath only a poſſibility may falſify, many conveyances may be deſtroyed: for admit that *A.* upon marriage with *Jane a-Style* makes a feoffment to the uſe of himſelf and his heirs till marriage; now by this way if he may deſtroy this contingency by feoffment or fine, *&c.* at any time before marriage, it would be very inconvenient.

Finch Solicitor General *contra*. *Leonard* takes by way of remainder. This caſe is out of the reaſon of *Pell* and *Brown*'s caſe, becauſe the deviſe here was firſt to *Thomas* and his heirs, and there is not any caſe in law where the deviſee

deviſee takes by way of executory deviſe, but for neceſſity, as *Dyer* 330. *b. Clache*'s caſe, *Cro. Jac.* 415. *Webb* and *Herring*, and it was adjourned. *Vide poſt.*

Wyndham Juſtice for the defendant. The principal point in the caſe is upon the words of the will, what eſtate *Thomas* had by them; and it hath been objected that *Thomas*
* P. 30. * had a fee-ſimple to avoid a contingency. *Anſw. Thomas* hath only an eſtate for life, and not more by the will, becauſe the expreſs words of the will are ſo. 2*dly*, If he hath an eſtate in fee, there ought to be a tranſpoſition in the words of the will. 3*dly*, This conſtruction avoids all the inconveniences which otherwiſe would happen; for otherwiſe it ſhall be to *Thomas* and his heirs by way of executory deviſe, and ſo ſuch eſtate cannot be cut off, as *Pell* and *Brown*'s caſe, *Cro. Jac.* 590. But here is a contingent remainder which may be deſtroyed, and it is more ſuitable to the rules of law, as it is agreed in *Colthurſt* and *Bejuſhin*'s caſe, in *Plowd. Com.*

2*dly*, When *Thomas* hath only an eſtate for life, with a remainder contingent, the eſtate for life being deſtroyed by the common recovery, the remainder falls to the ground, for the recovery veſts a fee in the recoverer, and is a diſcontinuance to the remainder. *Littleton, ſect.* 690.

3*dly*, Until the contingency happen, the fee deſcends to the heir in ſome ſort, but not to confound the eſtate for life, but there ſhall be an *Hiatus* to let in the contingency when it happens; ſo is *Archer*'s caſe. If tenant for life grant over his eſtate, the grantee ſhall ſupport the contingent remainder; but if he ſurrender, then the contingent eſtate is deſtroyed.

Twiſden of the ſame opinion. The main ſtreſs lies upon the conſtruction of the will; If *Thomas* here had been a ſtranger, and not heir, he had an eſtate for life, remainder to *Leonard* upon a contingency, remainder to the heirs of *Thomas* upon a contingency, and here the contingency doth not depend on a contingency, but the ſame contingency which may happen ſeveral ways. 2*d*, *Thomas* being heir, the fee in the mean time till the contingency happen is in *Thomas*, and not in abeiance, *Hutton, Rep.* 118. *Napper* againſt *Sanders*, and here as to *Leonard*, *Thomas* takes only for life, but by operation of law he hath a fee. And *Archer*'s caſe is expreſs *in Terminis*, for there *Robert* hath an eſtate only for life by the will, but by operation of law he hath the fee alſo; and *Pell* and *Brown*'s caſe is not like to this caſe, becauſe there *Thomas* had an eſtate to him and his heirs; and in the caſe of *Howel* and *Auger*, *Hut.* 60. and *Wirsh.*

Winch. 30. The judges will not meddle with the point of limiting one fee upon another. which the lord *Hobart* there calls the mounting one fee upon another; and here the recovery deſtroys the contingent remainder to *Leonard.*

* *Mallet* and *Foſter* Chief Juſtice of the ſame opinion; and judgment was given for the defendant, *niſi, &c.* * P. 31.

Widdrington's *Caſe.*

Mandamus. Poſtea 68. 1 Lev. 23. 1 Sid. 71. 1 Keb. 2, 50. 61, 68, 79, 131, 150, 234, 458.

DOCTOR *Ralf Widdrington,* fellow of *Chriſt-College* in *Cambridge,* was ejected out of his fellowſhip by the maſter and fellows, and he brings a *Mandamus* to be reſtored to it; and upon this writ the maſter and fellows return (amongſt other things) that if any fellow be peccant he ſhall be corrected by the maſter and dean, and if he find himſelf aggrieved with his puniſhment, it is lawful for him to appeal to the chancellor of the univerſity, and two ſenior doctors; and upon this return the court reſolved, That doctor *Widdrington* ſhall not have remedy here; but he ought to reſort to the viſitors mentioned in the return; for, by *Wyndham,* of every hoſpital or eleemoſynary foundation, appeal ought to be made to the viſitors, for they have the ſuperviſing of all things concerning them; and if they have no viſitors, then the ordinary, *vide Lindwood, Tit. de Religioſis Domibus, cap. Epiſcop. & licebit ei appellare,* is intended, that he may appeal if he will, or acquieſce in the penalty inflicted by the college, and not to give liberty to appeal to a viſitor, or to this court. And *Twiſden* cited a caſe 15 *Jac.* Dr. *Lewys* was elected provoſt of *Oriel-College* in *Oxford* by one part of the fellows, and Dr. Day by another part; Dr. Day appealed to the biſhop of *Lincoln* who was viſitor of the college; Dr. *Lewys* appealed to the archbiſhop, who inhibited the biſhop of *Lincoln*; and then Dr. *Day* appealed to the chancellor; and this was referred to the attorney and ſolicitor general; and reſolved the decree made by the viſitor was good, and the other ill, and the doctor enjoyed it accordingly; and every one ought to appeal to the next court, *Fitz-herb. Error* 87. And it was adjourned, and afterwards a writ of reſtitution was denied for the reaſons aforeſaid. *Vide poſt.*

Fitch

* P. 32.

* Fitch *verſus* Smalbrook. *Ejectment.*

Evidence.
1 Sid. 51.
1 Keb. 134.

IN evidence upon a trial at bar, it appeared that one *Alcot*, one of the witneſſes for the defendant, was before indicted of perjury in the time of *Cromwell*, and verdict againſt him; but by the death of *Cromwell* judgment was not entered, but all proceedings vacated; and now the counſel of the plaintiff would offer this verdict in evidence to weaken the credit of the witneſs; but reſolved by the court, That the ſaid verdict is now totally deſtroyed, and cannot be given in evidence.

Traverſe *verſus* Meres. *Aſſumpſit.*

Aſſumpſit.
1 Sid. 57.
1 Keb. 135, 146, 163.

THE plaintiff declares, That whereas the huſband of the defendant now dead, was indebted to the plaintiff, the defendant promiſed, That if the plaintiff would manifeſt and make appear that her ſaid huſband was indebted, ſhe would pay it; and avers, that he had been at all times ready to manifeſt the ſaid debt; and on *Non Aſſumpſit* found for the plaintiff. And *Allen* moved in arreſt of judgment, that there is not any conſideration, for that the wife was neither executrix nor adminiſtratix. *Trin.* 51. *Rot.* 1446. *Hunce* verſus *Hinton*. The ſon of the defendant was indebted to the plaintiff, and the defendant promiſed upon forbearance to pay; and there judgment was for the plaintiff, becauſe forbearance ſhall be taken for total forbearance; but if he had ſaid, That if he will forbear him, then it had not been actionable. *Trin.* 8 *Jac. Smith* verſus *Jones*, *Rot.* 882.

Twiſden Juſtice. The difference is betwixt forbearance generally, there is a good ground of action, although the defendant be neither executor nor adminiſtrator; but upon forbearance of the defendant it ought to appear that there was ſome cauſe of forbearance.

Wild for the plaintiff. The making of the debt appear, is trouble and pains to the plaintiff, and therefore a good conſideration. It was adjourned, and afterwards judgment was given for the plaintiff.

* Tibbs *verſus* Smith. * P. 33.

THOU *haſt ſtolen our bees (innuendo* a ſtock of bees) *they are hidden under the old woman's hemp-ſeck, and thou art a thief.* On not guilty, and verdict for the plaintiff, Serjeant *Merrifield* moved in arreſt of judgment, that bees are *feræ naturæ*, and felony cannot be committed of them, *Bro. Property* 37. ſo of trees, *&c. Stroud contra.* The reaſon of ſtealing of trees, the words are not actionable, is becauſe they are annexed to the free hold, but not here: and after verdict they ſhall be intended ſuch bees of which felony may be committed. And words of ſtealing trees, apples, *&c.* are actionable, and of corn. *Cro. Jac.* 39. *Kellan* againſt *Manneſky*, and 114. *Minors* and *Leeford*, 231. Words. 1 Danv. Abr: 146. p. 38.

Wyndham Juſtice. There is this difference where he ſays, *Thou haſt ſtolen my trees, apples, corn, &c.* theſe words are not actionable: but to ſay, *Thou art a thief, and haſt ſtolen my trees, &c.* are actionable, becauſe it ſhall be intended ſuch trees, corn, *&c.* whereof thievery may be committed; and as to the juſtification after, that doth not make the words actionable which were not actionable before; and judgment was given for the plaintiff; *niſi, &c.*

French *verſus* Kent.

ACTION of the caſe was brought for forging and contriving a will. This action was brought in *Middleſex*, and the land which is compriſed in it, lies in *Suffolk*, and the will being affirmed twice upon trial in an *Ejectione firmæ*, they endeavoured this way to diſprove it. Veaue.

Jones moved to change the venue to *Suffolk*, and reſolved it ſhall be altered; and the court ſeemed to diſcountenance ſuch action.

In a replevin in the county, the plaintiff doth not declare, and the avowant removes the cauſe to the king's bench by *Recordare*, and the plaintiff is non-ſuited without declaring; and the doubt was, What judgment the avowant ſhall have; for if he ſhall have judgment to have a return of the cattle, it doth not appear what cattle were replevied; becauſe the plaintiff hath not ſhewn them by any declaration; * and it ſeems the defendant ſhall ſuggeſt what cattle he took, and ſhall have return of them. *Vide Mich.* 3 *H.* 8. *Rot.* 649. *C. B.* and *Paſc.* 7 *H.* 7. *Rot.* 130. *C. B.* The defendant upon a *Non-proſ.* makes averment what cattle were taken, and Replevin. Nota. *Vide* Noy 50. Webb *verſus* Hind. * P. 34. Vide poſtea 474. Deſigney's Caſe.

and thereupon a *Return' Habend'* awarded, *ſi Vic' conſtare poterit allegationem præd' fore veram. Vide Raſtal's Entries Replevin Tit. Frank-tenement* in the *Old Book, fol.* 515. *D. Replevin de* 8 *Cows*, the defendant ſaid that there were more replevied, and upon this it was awarded *quod ſi Vic' conſtare poterit*, that the allegation of the defendant be true, he ſhall make return of the others, *Hob. Rep.* 16. Replevin was brought without naming a place, the count abated, but the defendant to have a return avowed in a place certain.

Barrington *verſus* Venables.

Privilege. 1 Keb. 137, 474.

DEBT upon an obligation of 100*l.* After imparlance, the defendant pleaded to the juriſdiction, that none of the privy chamber ought to be ſued in any other court at the ſuit of any perſon, without ſpecial licence of the lord chamberlain of the houſhold for the time being; and that he is one of the privy chamber. The plaintiff demurs, and judgment was, That he ſhould anſwer over, for ſuch plea cannot be pleaded after imparlance; and the plea it ſelf is ill; and the court ſeemed to be offended with the ſaid plea.

Memorandum. This term ſerjeant *John Kelyng* was made the King's Serjeant, and called within the bar in the place of ſerjeant *Glanvil.*

The King *verſus* Read.

Perjury. 1 Lev. 9. 1 Sid. 49, 66, 217. 1 Keb. 127, 138, 163, 182, 191, 198, 213, 214, 230.

IN an information of perjury, and verdict for the king; the perjury was committed in giving evidence upon a trial in this court betwixt *Dun* and *Dawſon.* And *Allen* moved in arreſt of judgment becauſe the information was, *Memorand' quod* Thomas Fanſhaw *Miles dat Curiæ hic intelligi & informari quod termino St. Hillarii* 1659. *in Rotulis continetur ſic (viz.) That* Dun *brought his Action*; and recites the whole record of it and the trial; and that the ſaid *Read falſum præſtitit Sacramentum* at this trial; and he moved that it is not * poſitive that the defendant took a falſe oath; but that *continetur ſic*, that he took a falſe oath; where he ought to have ſaid after the recital ſo, *Et ulterius dat Cur' hic intelligi*, that the defendant took a falſe oath at that trial. And after conſideration the court gave judgment againſt the defendant, becauſe the late precedents are ſo. And now after verdict it ſhall be taken a diſtinct ſentence betwixt the recital and the *Et quod.* And by *Wyndham,*

* P. 35.

him, the record recited being in this court, the judges ſhall take notice how far the record recited extends, and what that is that is poſitively rehearſed: and judgment was given accordingly.

Stiles *verſus* Triſpe.

THERE being a trial betwixt the parties the laſt aſſizes in the country, the parties aſſented to a reference, and a rule was there made of the ſaid reference; and the referees there made an award, the which the defendant refuſed to obey, upon which the plaintiff moved to have the ſaid rule at the aſſizes made a rule of this court, according to the tenor of the ſaid rule at the aſſizes; and it was granted: and then he moved for an attachment againſt the defendant for not obeying the ſaid award of the referees; but it was denied; for ſuppoſe the defendant will deny that any ſuch award was made, this court will not try ſuch iſſue by affidavits, and therefore they ſaid that it was ſeldom that any advantage accrued to the parties by ſuch reference. Award. 1 Sid. 54. 1 Keb. 130, 138.

Dacy *verſus* Linch.

DACY *is a witch, and deſerves better to be hanged than* Old Arthur, *who was hanged for a witch.* On not guilty pleaded, and verdict for the plaintiff, ſerjeant *Bear* moved in arreſt of judgment, becauſe *witch* is only a word of ſcolding, if it be not coupled with a demonſtration that he bewitched ſome creature. *Mich.* 8 *Car*, *Cro. Car.* 282. *George* againſt *Harvy*. *Mich.* 15 *Jac. Rot.* 636. *Hutt.* 13. *Stone* and *Roberts*. But it was adjudged for the plaintiff; for by *Mallet*, by theſe ſhall be intended ſuch a witch that deſerves to be hanged. Words. 1 Danv. Ab. 99. p. 34. 152. p. 16. 1 Sid. 52. 1 Keb. 140, 181, 184.

* Stevens *verſus* Brittredge. *Ejectment.* * P. 36.

Trin. 12 Car. Rot. 922.

2 Mod. R. 310.

ON a ſpecial verdict, Sir *Francis Wortley* ſeiſed of the lands in queſtion, covenants in conſideration of marriage with *Heſter* to ſtand ſeiſed to the uſe of himſelf for life, the remainder to *Heſter* for life, remainder to the heirs males which he ſhall beget upon the body of *Heſter*, remainder to Sir *Francis* in tail, remainder to *Francis Wortley* ſon and heir apparent of the covenantor in fee, who is Diſcontinuance 2 Danv. Ab. 573. p. 10. 576. p. 12. 1 Lev. 36. 1 Sid. 83. 1 Keb. 76, 141, 227, 321.

leſſor of the plaintiff. Sir *Francis* and *Heſter* after marriage in a fine with warranty to the uſe of *Sarah Wortley* daughter of the ſaid Sir *Francis* and *Heſter*, and wife of the defendant, and the heirs of the body of the ſaid *Sarah*; Sir *Francis* and *Heſter* die; *Francis* leſſor of the plaintiff enters, and the defendant in right of *Sarah* enters upon him, and the ſole queſtion was, If *Francis Wortley*, leſſor of the plaintiff, be barred by the ſaid fine and warranty.

Allen for the plaintiff. Theſe things are here conſiderable in the caſe. 1*ſt*, What eſtate Sir *Francis* and *Heſter* had, and if the eſtate be executed. 2*dly*, What operation the fine hath. *As to the firſt*, Here is not any conſolidate eſtate-tail in them, ſo that they can be ſaid to be ſeiſed in their demeſne as of fee-tail; but they have diſtinct eſtates; *(viz.)* To Sir *Francis Wortley* for life, the remainder to *Heſter* for life, the remainder to the heirs males which he ſhall engender upon the body of *Heſter*.

Object. This limitation of the remainder to the heirs males of both their bodies, ſwallows up the eſtates for life.

Anſw. Here is not any execution, becauſe all the eſtates are but one limitation in one conveyance, 2 *Co.* 60. *b. Wiſcot*'s caſe, 39 *H.* 6. 2. *b.* If lands be given to *A.* for life, the remainder to him and *B.* in fee, there is not any merger, becauſe it is but one conveyance. Then an eſtate to the wife for life, the remainder to the huſband and wife in fee, is an eſtate for life in the wife, and the fee is in both. 2*dly*, If a particular eſtate be limited to two perſons, and a remainder is limited adequate to them to drown; as to two for their lives, the remainder to the heirs of them, the eſtates for life ſhall be conſolidated; as *Lewis Bowle*'s caſe is. But * when there is a particular eſtate for life or two, and the remainder is not anſwerable to them; as to three for life, remainder to two in fee, there they ſhall remain diſtinct eſtates; as *A.* tenant for life, remainder to *B.* for life, the remainder to *A.* and *B.* in fee, there ſhall be no merger of eſtates; ſo here the baron hath an eſtate for life, and the wife another eſtate for life, remainder to them both. 3*dly*, There is not any rule or caſe where the eſtates may ſtand, that there ſhall be a merger; for they ſhall be ſo taken that the intention of the parties ſhall ſtand.

* P. 37.

As to the ſecond. This fine doth not make any diſcontinuance, admitting that the eſtates are ſeveral. 1. To make a diſcontinuance there ought to be a ſeiſin of the eſtate, which is to be diſcontinued, *Littleton, ſect.* 658. Tenant

nant for life, remainder in tail, he in remainder diſſeiſes tenant for life, and makes a feoffment; this is not a good diſcontinuance, becauſe he ought to have the freehold and inheritance at the ſame time; *Coke upon Littleton* 347. *b.* And here is not any ſeiſin by the huſband in his demeſne as of fee. In the caſe of *King* and *Edwards*, *Cro. Car.* 320. where *Jones* holds it a diſcontinuance; it is not like to this caſe, becauſe there the huſband and wife have not ſuch divided eſtates; for the huſband there cannot grant his eſtate diſtinctly. Here though the eſtate in remainder veſt in both, yet it veſts as a remainder, and not to execute the preſent eſtate. 2*dly*, This fine takes its plenary operation without prejudice to any, for by it an intire fee paſſes, which is the principal reaſon of *Bredon*'s caſe; and it is not like where there is an interpoſing eſtate, as tenant in tail enfeoffs the donor, it is not a diſcontinuance: but if there be an interpoſing eſtate, then ſuch feoffment is a diſcontinuance. *Garrard* and *Blizard*'s caſe, *Paſch.* 29 *Eliz. B. R. Trevillian*'s caſe. Tenant for life, remainder in tail, join in a feoffment, this is not a diſcontinuance, and here the reverſion of Sir *Francis* doth not impede. Cro. Elis. 56.

As to the third. Admitting the other points, the warranty operates nothing, becauſe the eſtate not being deveſted, the eſtate to which the warranty is annexed, is determined.

Winington for the defendant. 1. If this fine be a diſcontinuance of the remainder. 2. If it deveſt the remainder.

* *As to the firſt*, It is a diſcontinuance. 1. This eſtate is an eſtate-tail in them both, *Lit. Sect.* 28. 2. Where an eſtate for life is limited to the anceſtor, the remainder to the heirs of his body, there it is an eſtate by limitation, and not by purchaſe. Here Sir *Francis* and *Heſter* were tenants in tail executed. I agree, that if there be tenant for life, the remainder in tail, the remainder to the heirs of tenant for life, they are diſtinct eſtates, as in *Lewis Bowle*'s caſe. But this eſtate-tail cannot be at any time more executed in the huſband and wife than now it is. *Vide* 1 *Co.* 98. *b.* 3 *E.* 3. 31. Here the eſtate-tail cannot be granted without the eſtate for life. It ſeemed to the court that the eſtate is executed, and doth not differ from *Bredon*'s caſe. But it was adjourned. *Vid. Cro. Eliz.* 135. *Toſt* verſus *Tomkins*. * P. 38.

Read *verſus* Grapler. *Action ſur le Caſe, ſur Aſſumpſit.*

Coſts.

THE declaration upon the *Niſi Prius* roll varied from the plea roll, and the plaintiff at the *Niſi Prius* was nonſuit. And now *Jones* moved that the *Niſi Prius* roll being not warranted by the plea roll, the judge had not any authority to try the iſſue, and prayed that the *Poſtea* might not be entered, according to *Cro. Car.* 203. *Aquila Week's* Caſe, *Cro. Jac.* 669. *Young* and *Engleſield.* And upon conſideration of the caſes a *Diſtringas de novo* was awarded, and the nonſuit not material. But then the defendant inſiſted to have coſts, and they directed to ſearch precedents. And it ſeems he ſhall have coſts at the diſcretion of the court.

Poſt 73. Fitch *verſus* Vinot.

Elliſon *verſus* Elliſon.

Amendment. 1 Sid. 70. 1 Keb. 145, 168, 196, 202, 229.

IN debt upon an obligation againſt an executor; The defendant pleads it is not the deed of the teſtator; and found for the plaintiff, and judgment *quod defendens capiatur*, where it ought to be *in miſericordia*, becauſe it is a denial of the deed of his teſtator. And the defendant brought a writ of error. And *Foſter* moved to have it amended; and on this the court directed precedents to be ſearched. And now ſerjeant *Maynard* came and prayed that it might be * Page 39. amended, * becauſe it is error only in the entry, and not in the pronouncing the judgment. *Mich.* 33 & 34 *Eliz. C. B. Rot.* 230. ejectment by *John Wyld verſus Thomas Wheeler*, the judgment was *quod prædict' Thomas recuperet*, where it ought to have been *John*, and it was amended. *Trin.* 19 *Jac. Maſon* againſt *Thompſon*, ejectment of ten acres of land, five acres of paſture, and in the judgment the ten acres of land was omitted, and yet amended. *Mich.* 4. *Car. B. R. Everard* verſus *Boſvile*, debt upon 2 *E.* 6. for tithes, and upon a nonſuit in the judgment *quod Defendens eat ſine die* was omitted, and yet amended. *Mich.* 12 *Jac. C. B. Rot.* 1106. *Nulſon verſus* huſband and wife for words, there judgment was, that the huſband only ſhall be *in miſericordia*, and nothing ſaid of the wife, yet it was amended. Serjeant *Wild contra*, Every judgment entered upon the roll is preſumed to be pronounced by the court, and therefore it is the act of the court, and not amendable. As to the caſe of the ejectment, *John* for *Thomas*, it was only a perfect ſlip of

Hut. 41.

Hob. 127. More 869. Brownl. 2. part. 16. Scaif *verſus*.

of the clerk, and not any precedent that such judgment as this hath been amended. But in the Common Pleas it may be amended, for there are dockets of every judgment, and if the entry of the judgment be defective in the roll, they frequently amend it by the docket. It was adjourned, and after resolved, that it cannot be amended in another term, and ruled accordingly.

Dyer 315. pl. 99. in Cro. El. 84 Crowe's Case. *Judgment reverse pur cest cause*, & Hutt. 41. Sherley and Underhill.

Weeden *versus* Baldwin.

Hill. 1659. Rot. 478, *Hartford.*

EJECTMENT upon a demise of *Henry Baldwin*. On not guilty pleaded, a special verdict was found to this effect, *viz.* That before the writ one *Thomas Baldwin* and *Katharine* his wife, were seized of the land in *Shoreditch* in the county of *Middlesex*, to them and the heirs of *Thomas*, held of the king by knight service *in capite*. And also the said *Thomas* was seized in fee of the lands in question held in socage; and *Thomas* being so seised devised by his testament in writing the lands in question to *Katharine* for life, remainder to *Henry*, the lessor of the plaintiff, and his heirs, and dies, *Katharine* enters and dies, *Richard Baldwin* as heir to *Thomas* enters, *Henry* enters and demiseth to the plaintiff. *Powis* for the plaintiff. The question is here * if this devise by *Thomas* of the lands in question was good; *viz.* if he may devise all his lands held in socage. And *1st*, it is without doubt a good devise for two parts; and it seems to me a good devise for the whole. 1. Because the husband here hath not the lands held *in capite* at the time of his death, for he hath only an estate in fee in them expectant upon the death of his wife; and therefore a gift to husband and wife, and the heirs of the husband, the husband cannot dispose of the fee, reserving to himself an estate for life, 2 *Co.* 60. *b. Wiscot's* case. And if the husband dies first, the wife is sole tenant to the lord, and not the heir of the husband, and upon the death of the husband no heriot shall be paid, *Pasch.* 19 *R.* 2. *Fitz. Herriot* 5. Nor the heir shall not sue an *ouster le main*, although the land was held *in capite*, because it is a naked remainder, *Pasch.* 7 *Eliz. Dyer* 237. *a. Macwilliam's* case. 2. And here it is no more than the feme tenant for life, the remainder to the husband in fee; this remainder doth not restrain the devise, because this remainder is not held of the king, because tenant for life is tenant to the king. 9 *Co.* 126.

Devise. 2 Danv. Ab. 541. p. 8. 542. p. 10. 1 Lev. 18. 1 Sid. 55. 1 Keb. 9, 95, 51, 148.

* P. 40.

Floyer's

Floyer's caſe, 2 *Co.* 92. *b. Bingham*'s caſe, 9 *Co.* 129. *b. Quick*'s caſe, 134. *b. Aſcough*'s caſe.

Object. The words of 34 *H.* 8. *c.* 5. the third clauſe there, are, *Any one having a ſole eſtate or intereſt in poſſeſſion, reverſion or remainder held in capite*, and this eſtate of the huſband is a remainder.

Anſw. Remainder in this clauſe is intended ſuch which draws to him ward and marriage by the common law, and is in the nature of a reverſion, as is to be ſeen, 10 *Co.* 81. *a.* The caſe in point.

Trin. 28 *H.* 8. *Dyer* 11. *a. Bokenham*'s caſe, This very caſe is put by *Shelly* Juſtice.

Jones contra. Here the baron hath only the inheritance, and the wife only for life. 2. The king ſhall have the wardſhip at the common law in ſuch caſe: for if there be tenant for life, the remainder in tail, and he in the remainder in tail dies without heir within age, he ſhall be in ward. 33 *H.* 6. *a. b.* 27 *E.* 3. 80. *a.*

Twiſden Juſtice. When there are two jointenants, and to the heirs of one of them, it often has been a queſtion, If he that hath the fee may deviſe it; and there are opinions both ways.

Wyndham. In ſuch caſe he cannot deviſe. But it was adjourned.

* P. 41. * *Wyndham* Juſtice for the plaintiff. The deviſe is good for the whole ſocage land; and in this caſe we ſhall conſider, 1*ſt*, How this ſtood at common law. 2. How upon the ſtatute of 32 & 34 *H.* 8. 3. And how upon the proviſo where land is given to two and to the heirs of one of them.

As to the Firſt. *H.* ſeiſed *in capite* expectant on an eſtate for life, dies during the eſtate for life, no wardſhip can be, *M.* 24 *E.* 3. 33. *b. pl.* 28. *Fitz. Gard* 48. becauſe there is a tenant which may do the ſervice.

As to the ſecond. The ſtatute hath two clauſes, and there is not any ſuch perſon in this caſe that is intended by the ſtatute; for remainder by the ſtatute is intended ſuch as is in nature of a reverſion, the tenant of which ſhall be in ward at the common law. 10 *Co.* 81. *Leonard Lovie*'s caſe.

As to the Third. The proviſo is for the wardſhip of the body, but not of the land, and this proviſo altering the common law, ſhall not be amplified. *Amy Townſend*'s caſe.

Twiſden and *Mallet* to the ſame intent; but *Foſter* Chief Juſtice contra; becauſe this ſtatute of 34 *H.* 8. is an enacting law,

law, not only in the proviſo, but through the whole ſtatute. 2. Though the baron here is ſo ſeized, yet his heir may bring a real action, and ſay, that his father was ſeized in his demeſne as of fee the day he died, as *Wiſcot*'s caſe. 3. The ſtatute was for the benefit of lords, and alſo the people reciprocally, and here it is a benefit. 4. A judgment or recognizance acknowledged by the huſband ſhall charge this land in the hands of his ſon. But becauſe the other three juſtices were againſt him, judgment was given for the plaintiff.

Wheeler *verſus* Honour. *Ejectment.*

Copyhold. 1 Sid. 58. 1 Keb. 154, 166.

UPON evidence in a trial at bar, the caſe was, The defendant was a copyholder of the manor of *Latham*, in the county of *Middleſex*, and upon his admittance the lord, which was Sir *Thomas Reynolds*, leſſor of the plaintiff, demanded of him two years purchaſe for a fine, and aſſeſſed it in open court, and acquainted him with it, and appointed him to pay it half a year after. He at the time of the aſſeſſment ſaid, that he would pay only three years * quit-rent, becauſe the tenants of the manor are by the cuſtom there only to pay ſo much, and not a fine uncertain. And now the ſaid lord, for not paying the ſaid fine, entered for the forfeiture; and this was the title of the plaintiff. And it ſeemed to the court, that if there were a real doubt, whether the cuſtom be ſuch that the fine ſhould be certain or uncertain; if the tenant deny to pay an uncertain fine, this is not any forfeiture, although it be found afterwards that the fine ought to be certain; and ſo it was adjudged betwixt *Parker* and *Cook*. But then ſuch doubt ought to be real, and not covinous. But the counſel of the plaintiff directed to have this point found ſpecially, if occaſion be. 2. If a fine be incertain, and the place and time appointed for payment of it is aſſeſſed, it ſeems that there ought to be a demand, becauſe it is in point of forfeiture: but *Cro. Jac.* 617. *Gardner* againſt *Norman* is contrary. *Ideo Quære*, And the jury here found for the defendant, That the fine ought to be three years quit-rent.

* P. 42.

Cro. Eliz. 779. Dalton *verſus* Hammond.

Delabarre *and* Delaval *verſus* Yardly.

Amendment. 1 Keb. 125, 155.

IN an action on the caſe part is found for the plaintiff, and part for the defendant; and as to that that is found for the defendant, the judgment is entered *quod querens &* *plegii*

plegii fui sint in misericordia; and *Baldwin* moved that the judgment should be amended, and *plegii fui* struck out, because they ought not to be amerced; and the court gave day to consider of it.

Cook *against* Newcomb.

Assumpsit. 1 Keb. 158.

ASSUMPSIT. The plaintiff declares, That in consideration of so much money the defendant promised to deliver so many *livers* within a fortnight, and that the defendant hath not delivered them. The defendant pleads, that within the said fortnight, *scilicet* such a day, he delivered 25 of the *livers*, and then the plaintiff discharged him to deliver more till farther order of the plaintiff. That the plaintiff had not given any farther order. The plaintiff demurs; and adjudged for the defendant, that it is a good plea, because a promise before breach may be discharged by parol: but the plaintiff prayed liberty to discontinue his action; and it was granted him, *Nisi*, &c.

Cro. Car. 383. Lungeen & Stokes. *Vide* Barker *versus* Smith, Trin. 1651. Rot. 760.

* P. 43. * George Foster *versus* Grace Foster. *Ejectment.*

Durham, Trin. 1659. Rot. 751.

Uses. 1 Lev. 55. 1 Sid. 82. 1 Keb. 160, 225, 274, 319.

THE plaintiff declares, That *Nicholas Foster*, 19 *Jan.* 1658. at the parish of *Haughton in the Spring*, demised to him 2 messuages, 10 acres of land, 40 acres of meadow, 40 acres of pasture and 100 acres of Moor in *Haughton* aforesaid; To hold from the 30*th* of *Decemb.* last for five years, and that the defendant did eject him. Upon not guilty the jury found a special verdict, That before the said trespass and ejectment *Margery Foster* was seised of the said messuages, lands and tenements in fee, and the 8*th* of *Feb.* 1652. by her deed of the same date betwixt her of the one part, and *Mathew Foster*, her son, of the other part, did demise, grant, bargain, sell and set over to the said *Mathew Foster*, his heirs and assigns, all her part and proportion of that capital messuage or farm, which formerly appertained to her father *Robert Brough* deceased, and then in her tenure or occupation, with all houses, edifices, buildings, lands, meadows, pastures, feedings, commons, common of pasture and arable lands whatsoever, as were appertaining or belonging to her part of that farm-hold or tenements with the appurtenances, which the said *Margery Foster* then possessed, then being the tenements in the declaration

ration mentioned. The tenor of which said indenture followeth in these words following, *viz.* Articles of covenant concluded, condescended and agreed upon, 8 *Feb.* 1652. Between *Margery Foster*, late wife of *William Foster* of *Helton* in the Hole in the county of *Durham*, yeoman deceased, on the one part, and *Mathew Foster*, her son, of *Helton* in the Hole aforesaid, yeoman, on the other part, as followeth: *Imprimis*, The said *Margery Foster* for divers good causes her thereunto moving, and especially for and in consideration of the sum of 20 *l.* of lawful money of *England*, to be paid by him the said *Mathew Foster*, unto the assigns of the said *Margery* at 50 *s.* every half year for four years next ensuing after the decease of her the said *Margery*, Hath demised, granted, bargained, sold and set over unto the aforesaid *Mathew Foster*, his heirs and assigns, all her part and proportion of that capital messuage or farm, which formerly belonged to her father *Robert Brough* aforesaid deceased, and now in her tenure or occupation, with * all such houses, edifices, buildings, lands, meadows, pas- * P. 44.
tures, feedings, commons and common of pasture, and arable lands whatsoever, as appertaining or belonging to her part of that farmhold or tenement with the appurtenances, which the said *Margery Foster* now possesseth; To have and to hold the aforesaid moiety or part of all the aforesaid premisses with the appurtenances whatsoever, unto the aforesaid *Mathew Foster*, his heirs, executors and assigns for ever, the the said *Margery* quietly and peaceably enjoying the premisses aforesaid for and during her natural life. *Item* the said *Margery* is to have *Mathew Foster*'s barn with free egress and regress without let or molestation during her natural life for her full third part of all the houses due to her. In witness whereof the parties above named have hereunto set their hands and seals the day and year first above written. And the jury farther finds, that after (*viz.*) 5 *Novemb.* 1658. the aforesaid *Margery Foster* by her deed of feoffment executed by livery and seisin, as well for and in consideration of the natural love and affection which the the said *Margery Foster* did bear to *Nicholas Foster*, her said son, as for the full sum of 20 *l.* did grant, bargain, sell, alien, enfeoff and confirm unto the said *Nicholas Foster* the tenements aforesaid with the appurtenances; the tenor of which deed followeth in these words, This indenture made the fifth of *November* 1658. between *Margery Foster* of *Helton*, &c. of the one part, and *Nicholas Foster* of the same, yeoman, son of the said *Margery* of the other part witnesseth, That the said *Margery Foster*, as well for and

in

in conſideration of the natural love and affection, which ſhe beareth to her ſaid ſon, as for the full and juſt ſum of 20 *l.* to her in hand paid, or ſufficiently ſecured by her ſaid ſon, the receipt whereof ſhe doth hereby acknowledge, and thereof doth acquit, exonerate and diſcharge him her ſaid ſon, his executors and adminiſtrators, as for divers good and ſufficient cauſes her thereunto moving, hath given, granted, bargained, ſold, aliened, enfeoffed and confirmed, and by theſe preſents for her and her heirs, doth give, grant, bargain, ſell, alien, enfeoff and confirm unto him the ſaid *Nicholas Foſter* all that her capital meſſuage, farmhold and tenement ſituate, lying and being in *Helton* in the Hole aforeſaid, which deſcended unto her from *Robert Brough* deceaſed late of *Helton* in the Hole aforeſaid, late father of the ſaid *Margery Foſter*, together with all and all manner of houſes, edifices, buildings, barns, byars, laithes, ſtables, yards, garths, tofts, crofts, folds, gardens, orchards, lands, meadows, feedings, paſtures, commons, * common of paſture, woods, underwoods, ways, paths, paſſages, profits, commodities, emoluments and appurtenances to the ſaid granted premiſſes, or any of them, belonging or in any wiſe appertaining, or to or with the ſame, or any of them, now or at any time heretofore held, occupied, uſed or enjoyed, or accepted, reputed, taken or known as part, parcel or member of or belonging to the ſame; And all reverſion and reverſions, remainder and remainders thereof, or any part or parcel thereof; To have and to hold the ſaid capital meſſuage, farmhold, tenement and premiſſes with their and every of their appurtenances, to the ſaid *Nicholas Foſter*, his heirs and aſſigns for ever; To be holden of the chief lord or lords of the fee thereof, by and under the rents, duties and ſervices heretofore due, and of right accuſtomed. And the ſaid *Margery Foſter* for her ſelf, her heirs, executors, adminiſtrators and aſſigns doth covenant, promiſe, grant and agree to and with the ſaid *Nicholas Foſter*, her ſaid ſon, his heirs and aſſigns, That ſhe the ſaid *Margery Foſter*, her heirs and aſſigns ſhall and will from henceforth for ever hereafter ſtand and be ſeiſed of and in the ſaid granted premiſſes, and of every part and parcel thereof, to the uſe before mentioned and expreſſed, and to no other uſe, intent and purpoſe whatſoever. In witneſs whereof the parties aboveſaid to theſe preſent indentures have interchangeably put their hands and ſeals the day and year firſt above written, 1658. And the jurors farther ſay, That the eſtate to *Mathew Foſter* was as well for natural love and affection, as for 20 *l.* there mentioned to be paid; and the

* P. 45.

ſaid

ſaid *Mathew Foſter* died, having iſſue *Thomas Foſter*, and the lands in the declaration, and the lands in the deed of 1652. are the ſame lands, and that *Margery* is yet alive; And that *Nicholas Foſter* 12 *January* 1658. entered into the lands in queſtion, *&c.* and became ſeiſed *prout*, *&c.* and demiſed to the plaintiff; and the defendant by the command of *Thomas Foſter* entered upon him and ejected him. And if *Grace Foſter* be guilty *petunt adviſamentum curiæ*. And if ſhe be guilty, then they aſſeſs damages, 2*d.* and coſts 40*s.* and if not guilty, then not guilty; upon which record the caſe is ſhortly ſuch; *Margery Foſter* ſeiſed in fee 8 *Feb.* 1652. makes a deed to *Mathew Foſter* in this manner: Articles of covenants concluded, condeſcended and agreed upon between *Margery Foſter* of the one part, and *Mathew Foſter*, her ſon, of the other part. *Inprimis*, The ſaid *Margery Foſter* for divers good cauſes, and eſpecially for 20*l.* to be paid by the ſaid *Mathew* to the aſſigns of *Margery* at 50*s.* every half-year for four years next after the death of * *Margery*, hath demiſed, granted, bargained, ſold and ſet over unto the ſaid *Mathew Foſter*, his heirs and aſſigns, All that, *&c. Habendum* to him, his heirs, executors and aſſigns for ever, the ſaid *Margery* quietly and peaceably enjoying the premiſſes aforeſaid, for and during her natural life. *Item*, The ſaid *Margery* is to have *Mathew Foſter*'s barn with free egreſs and regreſs without let or moleſtation during her life, for her full third part of all the houſes due to her. And this deed had not any execution beſides ſealing and delivery, and then the ſaid *Margery* 12 *Jan.* 1658. made a feoffment to *Nicholas* and his heirs, to the uſe of him and his heirs; *Mathew* dies leaving iſſue *Thomas*, who commands the defendant to enter. * P. 46.

The only queſtion was, If any eſtate paſs to *Mathew* by the deed of 8 *Feb.* 1652. by way of raiſing an uſe.

Turner for the plaintiff. That no uſe ariſes, becauſe 1. At the common law no freehold paſſes without the ceremonies of livery and ſeiſin, or attornment, *Plowd.* 25. *a.* Nor by the ſtatute of 27 *H.* 8. *cap.* 16. becauſe there it is only by bargain and ſale. And *Coke upon Littleton* 271. *b.* Uſes are raiſed either by tranſmutation of poſſeſſion, as by fine, feoffment, common recovery, *&c.* or out of the eſtate of the owner of the land by bargain and ſale, or by covenant on a lawful conſideration. And to raiſe an uſe there are four things requiſite, *Mich.* 18 *Jac. Winch* 59. *Buckley* verſus *Simonds*. 1. Sufficient conſideration. 2*dly*, A deed teſtifying it; and therefore *Callard* and *Callard*'s caſe was

that

that no uſe could riſe by parol. 3*dly*, The covenantor ought to be ſeiſed at the time. 4*thly*, The uſes ought to agree with the rules of common law. Here is a good conſideration to raiſe an uſe according to *Pledal*'s caſe *Plowd.* 307. *a.* But the expreſs conſideration is 20*l.* and this excludes the implied conſideration of being her ſon, *Expreſſum facit ceſſare tacitum*, 7 *Co.* 40. *b. Bedel*'s caſe, 11 *Co.* 24. *b. Harpur*'s caſe, 4 *Co.* 80. *b.* Expreſs covenant takes away a covenant in law, 9 *E.* 4. 28. If an ordinary refuſe a clerk, who is a felon, generally it is good; but if he ſhew cauſe of this denial which is not ſufficient, as becauſe he wants tonſure or *Ornamentum Clericale*, he ſhall be fined and compelled to receive ſuch clerk, 5 *Co.* 97. *a.* The law never inquires for an aſſignee in law, when there is an aſſignee in deed.

Object. The jury have found, that this conveyance was upon both conſiderations.

Anſw. This cannot be aided by averment, *Dyer* 147. *a.* and it is contrariant; for the deed is found *in hæc verba*, and * therefore the jury cannot find a thing which appears contrary to the deed and record, and which is admitted by both parties. 2 *Co.* 4. *b. Goddard*'s caſe. 8 *E.* 2. *Fitz. Entry* 78. *F. N. B.* 205. *k.*

* P. 47.

True it is, there may be two conſiderations upon the raiſing an uſe. 1 *Co.* 176. *a. Beaumont* and *Fuller*'s caſe. But this is with this difference, when the uſes are directed to ſeveral perſons, and when to one and the ſame perſon, as it appears by that caſe and *Bedel*'s caſe before.

Object. Conſtruction of a deed ought to be ſuch *ut res magis valeat.*

Anſw. A freehold ſhall not paſs contrary to the rules of law. 8 *Co.* 94. *Foxe*'s caſe.

But admit ſuch averment may be, yet it ſtands not with the rules of law, and that ſuch eſtate may be ſo limited, *viz.* to reſerve an eſtate to her for life, to paſs a freehold *in futuro.* 1 *Co.* 130. *a. Chudleigh*'s caſe, *Trin.* 15 *Car. Peirce* verſus *Pitfield*, and *Dyer* 55. *a.*

Allen contra. The ſole queſtion is, If by the firſt deed any uſe be raiſed to *Mathew* the ſon. And here are two inquiries. 1*ſt*, Abſtractive, If the 20*l.* had not been mentioned if any uſe would ariſe. 2*dly*, If the addition of the 20*l.* vitiate the operation of the deed for raiſing an uſe. As to the firſt, that an uſe would have riſen, if the 20*l.* had not been mentioned; at the common law an uſe was only an equitable right to land, and therefore any contract either by deed or word would create an uſe; then the ſtatute

tate of uſes doth not alter the manner of raiſing of uſes; and therefore in *London* an uſe is raiſed by parol, *Dyer* 229. a. *Clibborn*'s caſe, and *Popham* 47. *Callard* verſus *Callard*, and the caſe of *Dyer* 296. *b.* is not truly reported, for the words were only *in futuro*, and for that cauſe only the uſe was not raiſed, *Cro. Eliz.* 345. *per Coke*, *Mich.* 10 & 11 *Eliz. Page* verſus *Moulton*. Promiſe to make an aſſurance to his ſon will not raiſe an uſe, and the judgment in *Callard*'s caſe was reverſed upon the miſtake that an uſe might be raiſed be parol. But now it is to inquire what contract will raiſe an uſe at this day. And in this conſider, 1*ſt*, Negatively, where it appears that an eſtate at common law ſhall be conveyed by intendment of the parties, there it ſhall not paſs by way of uſe, as *Foxe*'s caſe is, 2 *Roll's Abridg.* 786. *Trin.* 37 *Eliz. Rot.* 149. *B. R. Tebb* verſus *Popleweel*. A woman makes a deed to one, who ſhall be her huſband, the conſideration was *cauſa matrimonii prælocuti*, by the words *Dedi*, * *conceſſi & confirmavi* to the man and his heirs, and no livery; but there was a warranty in the deed. And by *Clench* and *Fenner* an uſe doth not riſe to the baron; but by *Popham contra* The reaſon of the two juſtices, becauſe it is only a feoffment *cauſa matrimonii prælocuti*; in this caſe no judgment is entered. But by *Popham*, If I ſay, After the death of ſuch an one my ſon ſhall have my land, an uſe ſhall riſe. And in *Vivion*'s caſe, *Dyer* 302. *b. Plowden* would aver that the releaſe there made was *pro fraterno amore*, and ſo to make an uſe ariſe. But this caſe was compounded, and the daughters at law had a ſmall conſideration, and the land was enjoyed againſt the opinion of *Plowden*. 2*dly*, When the deed binds to make farther aſſurance, there no uſe ariſes immediately. *Dyer* 162. *Wingfield*'s caſe, *Plowd.* 302. *b.* 307. *b. Bainton*'s caſe, *Dyer* 96. a. 235. 3*dly*, When the deed doth not contain a preſent declaration of the uſe but *in futuro*, 21 *H.* 8. 19. *Dyer* 55. a. *Burrow*'s caſe, 1 *Co.* 129, 154. Lord *Paget*'s caſe, Uſe was void to a ſtranger, and the caſe of *Buckley* and *Symonds* is upon the ſame reaſon, *viz.* becauſe the tenor of the deed was only by covenants and words *de futuro* and obligatory, and not declaratory. But in the affirmative, when a covenant and grant is compleat and refers to a future act, there an uſe ariſes although the deed be in form of a conveyance at common law, and the word *covenant* is not neceſſary, as *Hadel*'s caſe is: The word *Grant* raiſes an uſe by way of covenant; becauſe covenant is not obligatory, nor hath the effect of a covenant, and with this agrees *Tebb* and *Popleweel*'s caſe; and *Callard*'s caſe was not reverſed, becauſe the

* P. 48.

the words were only give and grant, but becauſe it was only by parol, *Trin.* 1649. *Wats* verſus *Dix*, The caſe as to this point was, that *Wats* granted, bargained, ſold in conſideration that the bargainee had been at great charges for him for meat and drink, apparel and lodging, and for natural affection, and there was not any money paid, but the deed was inrolled.

Trin. 1657. *C. B. Intrat. Rot.* 655. *Saunders* verſus *Savil.* *Henry Savil* ſeiſed of a rent in fee 14 *June* 18 *Car.* by indenture gives, grants and aſſigns to *Henry* and *Mary* his wife, and *John Savil* for and in conſideration of good will; *Habendum* to the ſaid *Henry and Mary* for their lives, the remainder to *John Savil* and the heirs of his body. And by *Hale* and *Atkins*, Although the conveyance was a conveyance at common law, yet a uſe did ariſe thereby; *Mich.* 1657. *Sympſon* verſus *Keyles*, in ejectment, On not guilty
* P. 49. * pleaded, a ſpecial verdict was, That *John Pullen* the father ſeiſed of land 1 *Septemb.* 1640. by deed gave to his ſon in theſe words, *viz. The father in conſideration of tender affection hath abſolutely given*, and livery was indorſed, but not made; and adjudged an uſe did ariſe to the ſon. And a difference taken where the father by feoffment gives to a ſtranger to the uſe of himſelf, remainder over, there no uſe ariſes; but when the conveyance is to the party himſelf, there the uſe will ariſe.

Object. *Cro. Jac.* 127. *Oſburn's* caſe.

Anſw. There it was good by confirmation, and that was only on evidence.

Object. *Hill.* 11 *Car. B. R. Rot.* 439. *Pitfield* againſt *Pierce* in ejectment: On not guilty pleaded, a ſpecial verdict found, that *Thomas* ſeiſed in fee makes a deed, which the jury found to be in conſideration of marriage, and it was in theſe words: *Know all men that I have given and granted, and do give and grant to* John *my ſon the lands in queſtion after my death*, Habendum *to him and to the heirs of his body.* *John* dies and hath iſſue *Elizabeth*, *John* the father enfeoffs *Thomas* the ſecond ſon. And if any eſtate paſſed to *John*, the ſon, was the queſtion; and adjudged that no eſtate paſſed.

But it was anſwered. This was a plain caſe, That the leſſor of the plaintiff cannot have title; for when tenant for life makes a feoffment, this is a forfeiture. And the reaſon of this caſe is within the ſecond rule before laid down, becauſe there is not any preſent execution, but after death. But in our caſe here, *1ſt*, There is a deed well executed, for ſhe grants the enjoying it; and *Callard's* caſe is the

the ſame caſe in point. 2*dly*, This caſe is not capable of farther execution, becauſe there cannot be livery. 3*dly*, Here is allotment of dower. 4*thly*, When a deed hath two intendments, it ſhall be conſtrued to eſtabliſh, and not to deſtroy an eſtate. As to the 2*d*, The addition of 20*l.* doth not alter the caſe; the words of the ſtatute are, That *the deed ought to be enrolled, when land is conveyed by reaſon only of any bargain and ſale*, and here it is not a deed that veſts the freehold by bargain and ſale only. And if there are two conſiderations, and both expreſs, then it would be without queſtion, *Plowd.* 4. *Manxel*'s caſe. 2. If no conſideration had been expreſſed, it might be averred, as *Mildmay*'s caſe is. And although one be expreſſed, yet the other may be averred.

* *Object.* As to *Bedel*'s caſe, * P. 50.

I anſwer. That caſe is not agreed, but by the council, 11 *Co.* 24. *b.* True it is, another conſideration ſhall not be preſumed, but it may be averred. And as to *Beaumont*'s caſe, *Dyer* 146. where the difference is, when it is to another perſon, and when to the ſame perſon, that is all one when money is given by a third perſon. But here needs no averment, becauſe it is for divers good cauſes and conſiderations, as well as money; and the court here may take notice of the conſideration of him as ſon; and it was adjourned. And after in *Hill.* 14 *Car.* 2. upon ſolemn argument at the bench it was adjudged for the plaintiff. *Vid.* as to this point a good caſe in *Ley's Rep.* 57. *Buckley*'s caſe, *Trin.* 15 *Jac.* in the court of wards.

Collins *and* Walker.

TRESPASS for beating and impriſoning his wife, *&c.* The defendant juſtifies by warrant of the ſheriff. The plaintiff replies *de injuria ſua propria abſque tali cauſa*, and iſſue upon it; and verdict for the plaintiff. And it was moved for a repleader, becauſe *de injuria ſua propria* is not a plea to matter of record, but the plaintiff ought to have traverſed the warrant. But judgment was given for the plaintiff, becauſe it is good enough after verdict; and ſo it was reſolved betwixt *Oſburn* and *Deſmond*, and *Peter* againſt *Stafford*, *Hob. Rep.* 244. *Vid.* 2 *Leon.* 81. *Moor* againſt Sir *John Savage*. Repleader. 1 Keb. 164.

May

May *verſus* Spencer.

Scire facias.

SCIRE FACIAS againſt the bail upon a writ of error according to the ſtatute of 3 *Jac.* The defendant prays *Oyer* of the condition of the recognizance, and upon that he pleads that the plaintiff proſecuted the writ of error with effect, and that thereupon the aforeſaid judgment was reverſed. *Et hoc paratus eſt verificare*, where it ought to have been *Prout patet per Recordum.* And for this defect the plea was ruled ill, and judgment given for the plaintiff.

* P. 51.

* Hodges *verſus* Hodges.

Amendment. 1 Keb. 203, 281, 292, 299, 310, 313. 3 Bulſtr. 61. Haver *verſus* Gibbons. Noy Rep. 121. Thimblethorp's Caſe. Hetley 59. Wolfe's Caſe. Marſh Rep. 17. pl. 40. & 46. pl. 72. ibid.

ERROR of a judgment in the Common Pleas; The error aſſigned was, that there were not any pledges: And *Powis* for the defendant in the writ of error, inſiſted that this is amendable, or at leaſt aided by 18 *Eliz. cap.* 13. becauſe in the common bench the pledges are always indorſed upon the original, and when there is not an original there are not any pledges; but then the court adviſed to pray a *Certiorari* upon alledging diminution; and upon return that there was not any original, the court debated it largely. And to *Wyndham* Juſtice it ſeemed that it is aided by the ſtatute of 18 *Eliz.*

But *Foſter* and *Twiſden contra.* But upon examination, and no diminution alledged, that there was an original, an amendment was awarded. *Vid. Dyer* 288. *pl.* 53. *F. N. B.* 31. *fol.* 195. *H. 8 Co.* 61. *b. Beecher's* caſe.

Orton *verſus* Fuller.

Words. 1 Danv. Abr. 106. p. 20. 1 Lev. 65. 1 Keb. 293. 303.

ACTION on the caſe for words, *viz. Orton* ſays, *I am a perjured knave, but he is a perjured knave as well as I; for he and* Field *ſwore one for another:* After verdict it was moved in arreſt of judgment, becauſe the defendant fires perjury upon the plaintiff only by relation, *viz. As well as I*, &c. But adjudged for the plaintiff.

Term.

Buxton *verſus* Bateman. *Derby.*

ACTION upon the caſe: The plaintiff declares that he is ſeiſed of an ancient meſſuage, and of lands within the pariſh of *S.* and that he and all thoſe whoſe eſtate he hath in them, have time out of mind uſed to ſit in a ſeat in ſuch an aiſle in the church in the ſame pariſh, and that the defendant had diſturbed him, to his damages, *&c.* The defendant pleads not guilty, and found for the plaintiff. And *Allen* moved in arreſt of judgment, becauſe the plaintiff hath not averred that he and all they, in whom he preſcribes, have uſed to repair the ſaid ſeat, which he ought to have done according to the caſes, *Co.* 3 *Inſt.* 202. *Corven* verſus *Pym*, *Cro. Jac.* 366. *Frances* and *Ley*, 604. *ibid. Dawny* and *Dee*, *Hob.* 69. *Boothby* verſus *Bayly*, 2 *Bulſtr.* 150. *May* verſus *Gilbert*; and the ordering of ſeats in the church being of eccleſiaſtical conuſance, the temporal law will not meddle with it, without ſpecial reaſon. Caſe. 1 Lev. 71. 1 Sid. 88, 201. 1 Keb. 345, 370, 386, 420, 433, 457. 1 Lutw. 1129

Twiſden Juſtice. I have conferred with moſt of the judges in this caſe, and they are of opinion that the declaration is good enough without ſuch allegation of repairing, this being in an action of the caſe; but if it had been in a prohibition, there perhaps it had not been good. But when it is as to ſuch houſe belonging, it is parcel of his franktenement, and then he doth not ſit there by the licence of the ordinary. *Wyndham* and *Mallet* of the ſame opinion, but *Foſter* for the defendant. But upon peruſal of the record it was not *tanquam meſſuagio prædict. pertinent.* but only that he and all thoſe whoſe eſtate he hath in the ſaid meſſuage, have uſed to ſit in the ſaid ſeat, *&c.* And upon this *Wyndham* and the other judges ſaid, that they would adviſe; and upon that it was adjourned.

In this term died Serjeant *Bear* of the county of *Somerſet*, who was the firſt Serjeant of the laſt call.

* P. 53. * *Sir* Henry Harbert *verſus* Juſtinian Paget, *Officer of the Court of King's Bench.*

Caſe.
1 Danv. Abr. 179. p. 1.
1 Lev. 64.
1 Sid. 77.
1 Keb. 288, 346.

ACTION upon the caſe: The plaintiff counts that the defendant had the cuſtody of the records of this court, and ought to keep them ſafely; and that *William Walker* brought an action upon the caſe againſt the plaintiff for words, and recites the whole record, and that he recovered againſt the plaintiff, and had judgment upon it, and damages 106*l.* And that this judgment was entered, that the plaintiff here *Capiatur*: And on this the plaintiff brought a writ of error in the Exchequer chamber, and that pending this writ, the defendant, *Paget tam negligenter cuſtodivit* the records, that this error was amended, and made, that the defendant there *ſit in miſericordia*, by which the plaintiff is made liable to pay the 106*l.* The defendant pleads Not guilty. And now this iſſue was tried at bar, and upon evidence it was proved, that all the clerks of the office have liberty to go into the treaſury and to view the records, and ſo have the clerk of the *Niſi Prius* for *Middleſex*, and his clerks, and all the philizers of this court, although they are not clerks of the office. And alſo that the records have been frequently amended after error brought; and in 4 *Car.* in *C. B.* in the lord *Savil*'s caſe, it was reſolved, That a record may be amended before a *recordatur* entered upon the roll; and upon all this evidence the jury found for the defendant.

Wheatly *verſus* Thomas.

Attainder.
1 Lev. 73.
1 Keb. 349, 436, 549, 615, 745.

IN ejectment. On not guilty, a ſpecial verdict found that *George* lord *Cobham* being ſeiſed in fee of the lands in queſtion 13 *Jan.* 1557. made his will and deviſed them to *Anne* for life, remainder to *William* for life, remainder to the firſt ſon of *William*, remainder to *George* for life, remainder to his firſt ſon, *&c.* And having two daughters *Eliz.* and *Katharine* limits them to *Elizabeth* for life, remainder to *Katharine* for life, remainder to the heirs males of his brother *Thomas*, remainder to the heirs of the body of *William*, his eldeſt ſon; *George* dies 4 & 5 *Ph. & Mar.* *Anne* dies, *George* dies without iſſue; *William* hath iſſue, *Henry* and *George*; *George* hath iſſue *William*; *William* hath iſſue *Pembroke*; *William* enters, *Henry* enters, *Henry* and
* P. 54. *George* are * attainted 1 *Jac.* In 3 *Jac.* an act is made reciting

citing the attainder, and confirms it; and then follows a proviſo in theſe words, Provided, and be it enacted, That the manor of *Cooling* (the lands in queſtion) ſhall be and remain, and be held and enjoyed to *Duke Brook*; and the heirs males of his body, remainder to *Charles*, remainder to *William Brook*, and the heirs males of his body, remainder to ſuch eſtates-tail as are mentioned in the will of *George* the deviſor: Sir *William* the ſon of *George* 7 *Jac.* was reſtored; *Henry* dies 13 *Jac.* Sir *William* ſurvives and hath daughters *Pembroke*, *Hill*, *Margaret* and *Frances*, Sir *William* the father of *Henry* dies, 39 *El.* *Frances* one of the daughters of Sir *William* demiſes to the plaintiff.

Baldwin for the plaintiff. The point is upon the act 3 *Jac.* which takes notice of the attainder of *Henry* and *George*, by which *Frances* hath good title as heir of the body of *William*, eldeſt ſon of *George*. 1*ſt*, This clauſe is relative to the will of *George*, juſt as if it had been particularly recited, and ſo is the conſtruction of relative clauſes in grants, 9 *Co.* 30. *a.* 20 *E.* 3. *Bro. Patents* 31 and 91. ſo in acts of parliament, *Plow.* 130. *Buckley* verſus *Thomas*.

1. *Obj.* The words of this proviſo are imperfect, *(viz.) and for default of ſuch iſſue ſhall be for ſuch eſtates in tail*, and doth not mention the eſtates.

Anſw. In an act of parliament words ought to be taken according to common parlance, as in *Arbitrement*, *&c. and ſo held and enjoyed* are ſufficient.

2. *Obj.* At the time of this act *Henry* was attainted of treaſon, and alive, and ſo no perſon *in eſſe* to take as heir of the body of *William* at that time.

Anſw. By this act there are five eſtates-tail to be ſpent before the will of *George* is ſo take place, *(viz.)* of *Duke*, *Charles*, *William*, *Caliſthenes*, *John*; and then comes the will of *George* by this act, and there is no eſtate in that will to *Henry* in particular; and it is ſufficient if the eſtate take effect when the particular eſtates are determined. 1 *Co.* 63. *Archer*'s caſe. And though in ſtrict and legal ſenſe *William* had not an heir at that time, yet *Henry* dying before the particular eſtate ſpent, the daughters ſhall take, and the daughters are heirs, as appears by the record; for *Henry* died 17 *Jac.* Suppoſe theſe four daughters ſhould bring a *Formedon* by the aid of that act of 7 *Jac.* they ſhall mention *Henry* and *George* in the writ, becauſe that act purges the attainder.

* 2. The intent of an act of parliament ought to be obſerved in its expoſition, and that was here, that as long as there was any iſſue of *George* in being, the land ſhould not * P. 55.

revert to the crown, for they had a care that none of the remainders ſhould be barred; and heirs here ſhall not be taken as in a conveyance, but in an equitable ſenſe, as 8 *Aſſiſes pl.* 5. *per Thorpe*, 8 *Co.* the *Prince*'s caſe.

3. This act is *quaſi* an act of reſtitution, which is *materia favorabilis*, *Co.* 3 *Inſt.* 241. I agree if this act had limited immediately eſtates according to the will of *George*, it had been a doubt whether good; but here it is after five eſtates-tail ſpent.

Jones for the defendant. This act of 7 *Jac.* hath no operation in this caſe, becauſe there is a proviſo in it, that it ſhall not extend to the lands forfeit for treaſon.

2. *Henry* at the time of his attainder had two eſtates in him, *(viz.)* one in poſſeſſion, and another in remainder; I agree that the relative words make the thing paſs as well as if they had been *verbatim* expreſſed; but here *Henry* cannot take as heir to *William*, which he muſt do, if he takes at all, *(viz.)* by purchaſe; and when a man takes by purchaſe, all the eſtate ought to be deſcribed, *Hob.* 31. and 34. *Aſhenhurſt*'s caſe; ſo in *Foſter* and *Ramſey*'s caſe, a deviſe to the heir of his brother, who was an alien; he could not take.

Object. He is capable of taking when the remainder falls.

Anſw. There is no intent that there ſhould be any contingent remainder. *Et adjournatur.*

Wynne *verſus* Lloyd.

Error to reverſe a Common Recovery in Wales.

Antea 16.

Error.
Poſtea 30, 86, 134.
3 Danv. Ab. 49. p. 7.
1 Lev. 72, 130, 146.
1 Keb. 351, 388, 459, 717, 748, 809, 914.
1 Sid. 213.

UPON the *Scire facias ad audiendum errores*, the Sheriff returned ſeveral ter-tenants, who pleaded ſeveral pleas, the one that he is but tenant for years of the demiſe of one *Owen*, another that there are other ter-tenants of the land, *(viz.) A. B. &c.* not named in the writ, judgment of the writ. A third, That the plaintiff had entered into part pending the writ: To theſe pleas the plaintiff demurred.

Allen for the plaintiff. That theſe pleas are none of them good, becauſe ſhould theſe be allowed, the plaintiff might be infinitely delayed.

* P. 56.

* *Williams* for the defendants, That theſe pleas are good, becauſe the ground of a *Scire facias* to the ter-tenants, is, that they may ſhew ſomething to maintain their poſſeſſion, and

and they may either plead in bar or abatement, and they may demand oyer of the record, *Dyer* 321. *a.* and they may have a releaſe to plead, they may plead jointenancy, *Hill.* 42 *Eliz. Cro. Eliz.* 739. *Holland* verſus *Danſey*. See in the ſame book 129 *Charnock* verſus *Worſley*, *Cro. Jac.* 332. *Bartholomew* verſus *Belfield*. Then as to the plea of entry of the plaintiff pendant the writ, it is a good plea in abatement. 1. Becauſe the nature of a writ of error is not to bar the right of the land, but to the action; and it lies not but when the plaintiff is prejudiced, and here the plaintiff is not prejudiced ſo long as he continues in poſſeſſion, be his poſſeſſion right or wrong; ſo for this reaſon the bail ſhall not reverſe a judgment given againſt the principal, becauſe it is but a conſequential prejudice. 2*dly*, The end of the writ of error is to have reſtitution, which he needs not, when he hath already entered; but here is a difference between poſſeſſion by act in law, and when by the act of the party. *Bridgman* 56. *Lloyd* verſus *Bethil.* 2*dly*, As to the plea that he is but tenant for years, it is a good plea, for it is no more than an aid prier of him of whoſe leaſe he holds. *Owen* 157. *Carew* verſus *Warren*. So the parol ſhall demur upon ſuch a *Scire fac.* for nonage, *Cro. Jac.* 392. *Herbert* verſus *Binion*.

Object. It is in the diſcretion of the court to grant a *Scire fac.* in ſuch caſe to the ter-tenants.

The court hath now awarded one, and the tenants now may have thoſe advantages as are incident thereunto; and there are many pleas which the ter-tenants may now plead, which after the reverſal of the judgment they cannot plead, as a releaſe of errors.

The court was of opinion that the pleas are but frivolous, and awarded that they plead in chief. *Vid. poſtea.*

Hurſt's *Caſe.*

Mandamus. Poſtea 94. 1 Lev. 75. 2 Sid. 94, 152. 1 Keb. 349. 354, 387, 558, 675.

ONE *Edward Hurſt* an attorney of the town-court of *Canterbury* being turned out by the commiſſioners within the late act for corporations, moved now for a *Mandamus*, and though it was ſuggeſted that it is a place concerning the adminiſtration of juſtice, and a precedent ſhewn *Mich.* 1651. in the caſe of an attorney in *Southwark*, yet *Foſter* and *Wyndham* denied it, but *Twiſden* and *Mallet* allowed it; ſo the court being divided in opinion no writ could be had. *Poſt.* 94.

* P. 57.

Southcot

Southcot *verſus* Rider.

Account.
1 Danv. Abr. 229. p. 27. 234. p. 2.
1 Keb. 354, 395.

ACCOUNT againſt the defendant as his receiver; The defendant pleaded that the 20*l.* in demand was delivered to him by the plaintiff to pay over to ſuch perſons as Sir *George Monk*, &c. ſhould think fit, and that they did award that they ſhould deliver it over to one *Hatehall*, &c. *abſq*; *hoc*, that he was his receiver *aliter vel alio modo*; and verdict for the plaintiff, and judgment *quod computet*; and before the auditors he pleaded a ſpecial plea; *(viz.)* The act of oblivion; and upon that the plaintiff demurred.

Jones for the plaintiff. It is not a good plea, becauſe it ought to have been pleaded in bar to the action, and not before auditors, for otherwiſe ſuch ſuits will be endleſs.

Polexfen for the defendant. Many things may be pleaded in bar and in abatement too, 41 *E.* 4. 31. 9 *E.* 4. 15. *Bro. Accompt* 43 and 48. *Lateh.* 59. *Hopton* verſus *Offal*, and payment to the plaintiff or a ſtranger is a plea in diſcharge, and yet may be pleaded in bar, *Raſt. Entr.* 16. 19 *H.* 6. 5. and this is a proper plea in diſcharge; for otherwiſe it would be infinite. The court ſeemed that the plea was well enough, but the defendant pleads ill as to the time, and when the plaintiff charges him as receiver from ſuch a time to ſuch a time, he muſt anſwer that preciſely; and for that cauſe judgment was given for the plaintiff.

Hole *Executor of* &c. *againſt* Bradford, *Executor of* B.

Executer.
1 Sid. 88.
1 Keb. 344, 366.

DEBT upon the ſtatute of miniſters for fifths againſt an executor. The defendant pleads *Nil debet*, and verdict for the plaintiff. *Stroud* moved for the defendant, that this action ſhall not charge the executor, it not being a duty in the teſtator. But, by the court, the executor is chargeable, becauſe it was a duty in the teſtator; but eſcape lies not againſt the executor, becauſe the action is founded *ex delicto*; but it lies upon the ſtatute of 2 *Ed.* 6. * for tithes; and judgment was given for the plaintiff by the whole court.

* P. 58.

Baker

Baker *verſus* Berisford. *Covenant.*

Trin. 1657. Rot. 1902.

THE plaintiff declares, that *Abraham Baker* was ſeiſed in fee of copyhold land in *Weſtham* in the county of *Eſſex*, and alledgeth a cuſtom in the ſaid manor of *Weſtham*, that the wife ſhall be endowed of the moiety of all ſuch copyhold lands as her huſband was ſeiſed of, and that *Abraham* died having a wife named *Mary*, who had a moiety of the ſaid land aſſigned her for her dower, and that *John* his ſon had the other moiety, and that *Mary* and *John* joined in a leaſe for years to the defendant, rendering 100*l.* *per annum (viz.)* 50*l.* to *Mary*, and 50*l.* to *John*, and that *John* dies, and the plaintiff as his widow demands 25*l.* And on *Nil debet*, and verdict for the plaintiff,

Cuſtom. 2 Danv. Abr. 440. p. 9. 3 Danv. Abr. 387. p. 6. 1 Lev. 154. 1 Sid. 76. 2 Sid. 1, 9. 1 Keb. 485. 356, 480, 509, 515, 838, 893.

Jones moved in arreſt of judgment, That the breach is not according to the cuſtom, becauſe the wife is but to have a moiety, but here ſhe claims a moiety of a moiety, and a cuſtom ought to be purſued ſtrictly; but by the court it is directly within the cuſtom, and adjudged for the plaintiff.

Billing's *Caſe.*

BILLING was committed to the Marſhalſea for divers miſdemeanors, and he being in priſon for the ſaid offences was charged with actions, and judgments obtained againſt him; and the court was moved he might be diſcharged of thoſe actions; and reſolved by the court, When a man is in priſon for criminal matters he is not chargeable with a civil action without leave of the court; but if he happen to be charged, *fieri non debuit, ſed factum valet*, but they ought to have moved the court firſt; but now once charged he cannot be diſcharged.

Charge. 1 Keb. 303.

* Dove *verſus* Darkin. *Ejectment.*

* P. 59.

JUDGMENT was given againſt the defendant, and he brings a writ of error, and aſſigns for error, that the plaintiff was dead at the time of the judgment given. The plaintiff's entry is, That the aforeſaid plaintiff by *A. B.* his attorney *venit & dicit*, that he is in life, and iſſue thereupon, and found for the plaintiff in the writ of error that he was dead; and Serjeant *Maynard* moved that the judgment might be reverſed.

Error. 1 Lev. 80. 1 Sid. 93. 1 Keb. 368, 375, 413.

Allen

P. 31 H. 6. 15. 8. plac. 4.

Allen contra, Becauſe there ought to have been a *Scire fac.* againſt the executors of the party dead.

Wild. There is neither executor nor adminiſtrator.

Wyndham Juſtice. It is well enough, and a precedent comes near it, *Raſtal's Entries, Tit. Brief in Mort. pl.* 1. *fol.* 108. And it was adjourned. *Poſt.*

Wiſeman *verſus* Cotton. Hill. 13 Car. 2.

Rot. 476.

Cuſtom. Poſtea 76. 2 Danv. Abr. 441. p. 2. 1 Lev. 79. 1 Sid. 17, 135. Hard. 325. 1 Keb. 288, 372, 492, 505.

THE plaintiff counts, That whereas there was a diſcourſe concerning the manor of *Farningham*, and the plaintiff affirmed that it was deviſable by the cuſtom of *Kent*, in conſideration that the plaintiff would give the defendant 5*l.* the defendant aſſumed to give the plaintiff 40*s.* if it were not deviſable, and avers that it is not deviſable. The defendant pleads that it is deviſable by cuſtom; and upon that a ſpecial verdict, That by act of parliament 2 *E.* 6. the lands of Sir *Henry Iſles* amongſt others ſhould be from henceforth to all intents, conſtructions and purpoſes as lands at the common law; They find that lands in gavelkind are deviſable; and if the act of parliament takes away the other collateral qualities, as well as the partibility, was the ſole queſtion.

Jones for the plaintiff. By this act all qualities of gavelkind are taken away.

Winington for the defendant. Deviſable or not, is not an eſſential quality of gavelkind. *Lambert's Perambulation* 584, 585. *Spelman's Gloſſary, Gavelkind* 412. 1 *Inſt.* 140. *Lambert* 25 and 26. As for other particular cuſtoms they ought to be * ſpecially alledged, as dower of a moiety, 2 *E.* 4. 18. *b.* 5 *E.* 4. 8. but gavelkind ought not; but the court takes notice thereof, *Cro. Car.* 561. *Launder* verſus *Brook*, and *Davies* 50. *Adjournatur.* But the court inclined that the act had not deſtroyed this quality. *Poſt.*

* P. 60.

Mould *verſus* Wallis. *Covenant.*

Covenant. 1 Lev. 81. 1 Sid. 142. 1 Keb. 376, 469, 512.

THE plaintiff declares upon an indenture of apprenticeſhip. The defendant pleads, That at the time of the entering into the ſaid indenture he was an infant. The plaintiff replies, That by the cuſtom of the city of *London*, if one under age binds himſelf an apprentice, that it ſhall be good againſt him. The defendant demurs.

Jones

Jones for the defendant. It is a departure. 1 *Inſt.* 304. *a.* If *H.* intitle himſelf in his former plea by the common law, in his ſecond plea he ſhall not enable himſelf by a cuſtom, but ſhould have pleaded it at firſt; ſo is *Keilw.* 75. *b.* the abbot of *Bokefaſt*'s caſe.

Howel for the plaintiff. The caſe in 21 *H.* 7. *pl.* 29. is otherwiſe, where in aſſize the defendant pleads feoffment of a ſtranger: The plaintiff replies, That the feoffor was an infant; The defendant rejoins, That there was a cuſtom that he might make a feoffment at fifteen; and reſolved no departure: 'Tis true, 37 *H.* 6. 5. there was a departure, becauſe he began with a general cuſtom, and concluded with a particular one; and this ſeems to be good by *Cro. Car.* 652. *Walker* verſus *Nicholſon*; but no judgment is there given.

Wyndham Juſtice. It is not any departure from the title, but only a plea to the diſability.

Twiſden Juſtice. *Hutt.* 63. *Jennings* verſus *Pitman*, ſeems to make it a departure, *Cro. Car.* 179. *Guilbert* verſus *Fletcher*. The action here is founded upon the covenant, and he doth not come in the replication and maintain his action, but anſwers to the diſability, and ſo no departure.

Jones. The book of 21 *H.* 7. 17. is contrary to *Yelv.* 14. *Adjournatur*. *Vide Godb. Rep.* 122. the ſame caſe *pl.* 143. *Moor* 135. *pl.* 280. *Stanton*'s caſe, *ante*, *Granger* verſus *Hembrough*.

* Lawſon *verſus* Witherington. * P. 61.

DEBT upon an obligation conditioned to pay 100*l.* upon the tenth day of *January*, upon three months warning. The defendant pleads that the plaintiff had not given three months warning. The plaintiff demurs. Condition. 2 Danv. Ab. 68. p. 8. 1 Lev. 85. 1 Keb. 380, 415.

Weſton for the plaintiff. I conceive three months warning ſhall be taken upon any tenth day of *January* after three months warning given by the plaintiff, and if it ſhall be ſo taken, then the defendant's plea is but in abatement of the writ, and ſo he pleading in bar, it is naught. *Cro. Eliz.* 202. *Iſham* and *Paget* verſus *Hitchcock*.

Twiſden Juſtice. Pleading in bar when it is in abatement, is not good.

Wyndham Juſtice. Although it had been to pay on the tenth of *January* after the date of the obligation, upon three months warning by the obligee, though the obligee omit

emit the warning, yet the money shall not be lost; and so it hath been resolved in the time of *Roll* Chief Justice, and the other shall be bound to pay it at any three months warning. *Adjournatur.*

Saunders *versus* Edwards.

Case.
3 Danv. Ab. 212. p. 5.
1 Sid. 95.
1 Keb. 389.

IN an action on the case, the plaintiff counts that he is a clerk of the inrolment office, and that the defendant *Crimen felonia ei imposuit*, by which he had like to have lost his office. The defendant pleads, That as to the imposition of felony, otherwise than by speaking of scandalous words, not guilty; and as to the speaking of the words, *non infra duos annos*. The plaintiff demurs.

Wild for the plaintiff. This is not within the statute of limitations, no more than slander of title.

Jones for the defendant. The imposition of felony is actionable by it self, and then the other words are within the statute.

Wild. *Crimen felonia imponere* cannot be by words alone, but by some act, as carrying him before a justice of peace, *&c.*

Twisden Justice. If the words are actionable at first, then the damages after do not give cause of action; and the first plea is a full bar, and the other fruitless, and of that opinion was the whole court; and so judgment for the defendant, *nisi*, *&c.*

* P. 62.

¶ James Norfolk *versus* Aylmer.

Sheriff's Bond.
1 Lev. 209.
1 Keb. 391.

DEBT upon an obligation, conditioned that whereas *Smith* was committed to the Serjeant at arms by the House of Commons, if the said *Smith* shall be a true prisoner, and pay all fees due, *&c.* that then, *&c.* The defendant pleads the statute of 23 *H.* 6. The plaintiff demurs.

Powys for the plaintiff. A serjeant at arms is not within that statute, for it begins with keepers of gaols, and a serjeant at arms is above such a one, according to the rule given 2 *Co.* 46. and the office of serjeant at arms is properly to attend the house, and not to be a keeper of prisoners. It is true, that *Cro. Eliz.* 66. *Bracebridge*'s case is, That the Marshal of the King's Bench is without question within that statute. Serjeant at arms within the marches

marches of *Wales* is out of this ſtatute. *Cro. Car.* 309. *Johns* verſus *Stratford.*

Levinz for the defendant. This obligation is void by 23 *H.* 6. for it is within the words of the ſtatute, which are keepers of priſons, or other the officers aforeſaid. *Cro. Eliz.* 108. *Truſſel* verſus *Aſton.* And as to the objection that a ſerjeant at arms is above a ſheriff, I deny it, and here this ſtatute ought to be taken according to equity, as ſometimes penal ſtatutes are, *Trin.* 9 *H.* 6. 19. *pl.* 13. Debt by the mayor of the ſtaple, *Plowd* 35. Debt againſt the keeper of *Ludgate*, *Dyer* 321. Debt againſt the marſhal. 2*dly*, This condition is void at the common law. 1*ſt*, It reſtrains trade and livelihood, 2 *H.* 5. 5. and *Owen* 143. 2*dly*, That he ſhall pay all fees due, *&c.* until he ſhall be diſcharged by the Houſe of Commons, which may never be, becauſe they may be diſſolved, *&c.* 3*dly*, It is an obligation to pay fees before they are due, which is extortion. *Co.* 2 *Inſt.* 210. *Hut. Rep.* 52. *Et adjournatur.*

Davies *verſus* Jones.

FOR words of a Broker, ſpeaking of his profeſſion, *He is a cheating knave, he hath cheated me with braſs money.* After verdict *Pemberton* moved in arreſt of judgment, and cited *Hutt.* 13. *Gilling* verſus *Redſcam*'s caſe; but reſolved by the court, That to call a tradeſman *a cheat*, an action will lie if he ſpeaks of his profeſſion; but to ſpeak it generally it will not; and adjudged for the plaintiff. Words. 1 Keb. 393.

* Littleboy *verſus* Wright. *Error*, *Marſhalſea.* * P. 63.

ACTION upon the caſe for words *(viz.) You are a whore*, &c. *per quod ſhe hath loſt her marriage*, and verdict for the plaintiff and judgment; and now ſerjeant *Maynard* aſſigns for error, That it doth not appear that the cauſe of action, *(viz.) That the loſs of marriage* was within the juriſdiction of the court, and the other words are not actionable, and for this cauſe judgment was reverſed. *Vide Cro. Car.* 570. *Ireland* verſus *Blackwel*, *contra.* Juriſdiction. 2 Danv. Abr. 300. p. 4. 1 Lev. 69. 1 Sid. 85, 95. 1 Keb. 328.

Term.

* Term. Hill. 14 Car. 2. B. R.

Sir *Robert Foſter*, Chief Juſtice.
Sir *John Mallet*,
Sir *Thomas Twiſden*,
Sir *Wadham Wyndham*, } Juſtices.

Memorandum, The laſt vacation *John Hern* Secondary died, and *Thomas Jekel* of *Eſſex* ſucceeded him.

Palmer *verſus* Richard.

Diſcontinuance.

REPLEVIN. The defendant makes conuſance to *A.* That one *Knight* was ſeiſed in fee of the place in which, *&c.* and granted a rent-charge to *A.* and ſo makes conuſance for ten years rent. The plaintiff repljes in bar, that *Knight* was not ſeiſed in fee, and the defendant demurs. And ſerjeant *Wild* moved for the plaintiff to amend his plea, becauſe it doth not appear by the whole record that *Knight* is dead; and then, though *Knight* be not ſeiſed in fee, yet if he be alive the grant ſhall be good during his life.

Twiſden. If *Knight* were alive at the time of the diſtreſs, the defendant ought to juſtify; for if tenant for life grant a rent, if the grantee diſtrain, and after tenant for life dies, he ought not to make avowry nor conuſance, but to juſtify, becauſe the taking was lawful. In this caſe the record being entered, *Read* for the plaintiff came too late to have it amended; but then *Wild* moved to have leave to diſcontinue, and it was granted.

Eliot *verſus* Blake.

Covenant.
1 Lev. 88.
1 Keb. 424, 426.

IN covenant, The plaintiff declares upon an indenture dated 7 *Sept.* 1657. whereby the defendant covenants, that he one *T. W.* would deliver to the plaintiff ſo many maunds of ſalt-peter at ſuch a rate before the 20*th* of *October*

October enſuing, the plaintiff paying ſo much a maund, and to the performance thereof the defendant binds himſelf in 500*l.* The defendant demands *Oyer* of the deed, and by the ſame it appears, that between the ſame covenant and the obligation, there is a proviſo, That if the defendant ſhould between that and the ſaid 20*th* of *October* be diſabled by the ſea, *&c.* to deliver the ſaid ſalt-peter, then the deed ſhould be void. The defendant pleads, That he within the time aforeſaid had prepared one thouſand maunds of ſalt-peter, and that the boat wherein it was put was caſt away, and ſo he was diſabled. The plaintiff replies, that the defendant had ſufficient ſalt-peter over and above what was caſt away; and iſſue thereupon, and found for the plaintiff, and damages 300*l.* And *Allen* for the defendant moved in arreſt of judgment, That there is a variance between the deed and the declaration, for in the declaration the proviſo is omitted.

Jones for the plaintiff. 1*ſt*, The action is brought upon the covenant, and not upon the penalty, and the reciting of the penalty is but ſurpluſage. 2*dly*, The declaration is ſufficient without recital of the proviſo, according to *Ughtred*'s caſe, and the defendant ought to plead the proviſo; and of this opinion was the whole court; and judgment was thereupon given for the plaintiff.

The King *verſus* Giſlifer.

THE churchwardens and overſeers of a pariſh in the county of *Derby* place a child, which was the baſtard child of one *Mary Newton* with the defendant, according to the ſtatute of 43 *Eliz. c.* 2. and do appoint the defendant to receive the ſaid child; the defendant appeals to the ſeſſions, and there the juſtices make an order, that the defendant ſhall take the ſaid child as his apprentice; and now the defendant brought his *Certiorari* and removed the ſaid order into this court.

Apprentice. 1 Lev. 84. In a Caſe between the pariſh of *Heaton* in *Kent* and *Steers*, 1654. B. R. The Queſtion was. Whether the Defendant was compellable to take an Apprentice, by 43 Eliz. And Rolls Chief Juſtice ſaid, That if by any ſo advantageous a thing to the common-wealth. But the buſineſs was referred to the juſtices of aſſiſe, who ordered that *Steers* ſhould take an apprentice, and for diſobeying this order, an attachment was granted.

* *Allen* moved to quaſh the ſaid order; and ſome exceptions he took to the form of it, *(viz.)* 1*ſt*, It doth not appear that this child was a poor child. 2*dly*, Nor in what trade he ſhall be an apprentice. But to theſe exceptions the court anſwered; 1*ſt*, That it ſhall come on the * P. 66.

means he could, he'd conſtrue the ſtat. to compel the party, becauſe it was

other

other part that ſhe is not a child within the ſtatute. And *2dly*, Huſbandry is intended by that ſtatute, and ſo ſhall be conſtrued to be meant in the order until the contrary do appear. But the main queſtion upon the order was, Whether the defendant within this ſtatute may be compelled to take an apprentice. And *Allen* moved that he could not. *1ſt*, By this ſtatute the churchwardens and overſeers may bind out ſuch an apprentice as well out of the pariſh as within it, and then it ſhall be inconvenient that ſtrangers ſhall be compelled in this caſe. *2dly*, The words of the act are, *That it ſhall be binding to the apprentice, as if he or ſhe had been bound themſelves by indenture*; ſo that the intent of the act was, That the apprentice chiefly ſhould be bound, and not be chargeable again to the pariſh, and not the party who may be but tenant at will. *3dly*, This act extends over all England into corporations, *London*, *&c.* And if any one ſhall be compelled to take an apprentice, an alderman or any other perſon of quality may be charged to take ſuch an apprentice.

Bigland contra. That it hath been the received opinion ſo amongſt the judges from time to time. And at length *per Foſter*, *Mallet* and *Wyndham* the order is good; but *Twiſden contra*. And *Wyndham* ſaid the judges of *Serjeants Inn* in *Chancery-lane* were divided in this caſe. And *Twiſden* ſaid that the judges in *Fleet-ſtreet* were of his opinion; and thereupon it was ordered, that the order ſhould be confirmed; and that the law might come in debate, an information ſhould be exhibited againſt the defendant for not performing thereof.

Braham *verſus* Aſpinal, C. B. *Error*.

Viſne.

IN debt upon an obligation, conditioned to pay money at the houſe of one *Tarrow* in *Woodſtreet magna*, *London*. The defendant pleads, that he paid the money at the ſaid houſe in *Woodſtreet*, but names no pariſh, and upon that a *Venire fac.* iſſues to the pariſh of St. *Michael Woodſtreet*, and found for the plaintiff, and judgment; and the defendant brings a writ of error, and after the record certified, * alledges diminution in the *Venire fac.* and upon the return thereof it appears to be as before, and the now plaintiff aſſigns this for error, for that the pariſh of St. *Michael* is not named in any part of the record.

* P. 67.

Twiſden. The words of the ſtatute of 21 *Jac. cap.* 13. are by reaſon the viſne is ſued out of more places or of fewer

fewer places than it ought to be, ſo as one place be right named, are to be intended when ſome of the places are named in the record: And therefore if an action is laid in *D.* and a *Venire fac.* iſſues *de Corpore Comitatus*; there although the *Venire fac.* be awarded to more places, yet it is not good, becauſe the body of the county was not named before in the record; and it was adjourned: But afterwards it was ruled good being after verdict, becauſe it ſhall be intended St. *Michael* is in *Great Woodſtreet*; and judgment was affirmed.

The King *verſus* Hardy.

INDICTMENT of a forcible entry, for entering into a copyhold, and that the defendant *ejecit & diſſeiſivit* the party: And *Powis* moved to quaſh it, becauſe it ought not to be *diſſeiſivit* upon 21 *Jac. cap.* 15. and ſo is *Coke* 4 *Inſt.* 176. in the margent; and for this cauſe the indictment was quaſhed. Indictment. 1 Keb. 423, 428. 435.

Stonehouſe *verſus* Bodvil.

THE plaintiff declares upon an *Indibitatus aſſumpſit* for phyſick, wares and commodities provided and delivered for the daughter of the defendant at his requeſt; after *Non aſſumpſit*, and verdict for the plaintiff, *Williams* moved in arreſt of judgment, becauſe it is a collateral promiſe, and ſo no debt, and conſequently the plaintiff ought to have declared ſpecially: But the whole court reſolved it well enough. For that, 1*ſt*, It is for wares provided and delivered *(for)* not *(to)* the daughter of the defendant, and ſo after a verdict it ſhall be intended delivered to the defendant for the daughter. 2*dly*, An action of debt will lie for this; as if the father deſire one to find phyſick for his daughter, debt lies againſt the father, and ſo *Indebitatus aſſumpſit*; and judgment was given for the plaintiff. Aſſumpſit. 1 Danv. Abr. 27. p. 10. 1 Keb. 439.

* *Sir* Edward Bathurſt *verſus* Cox. Mich. 14 Car. 2. Rot. 783. * P. 68.

DEBT for 40*s.* impoſed as a fine upon the defendant at a court leet of the plaintiff's, for a contempt there committed; the contempt was, *That he put on his hat in the court*, and upon the ſteward's admoniſhing him of ſuch Contempt. 2 Danv. Ab. 292. p. 8. 1 Keb. 451, 465.

ſuch his doing, he anſwered, *I do not value what you can do.* And adjudged for the plaintiff.

Vernon *verſus* Alſop.

Condition. 2 Danv. Abr. 24. B. p. 4. 1 Lev. 77. 1 Sid. 105. 1 Keb. 356, 415, 451.

THE plaintiff declares upon a bond of 14*l.* The defendant demands *Oyer* of the condition, which is, That if the defendant pay 2*s.* a week till 14*l.* be paid, and upon default of payment the obligation ſhall be void. The defendant pleads, That the 17*th* of *October* ſuch a year he made default of payment; judgment *ſi actio.* The plaintiff demurs, and adjudged for the plaintiff, becauſe the condition is ſenſeleſs, and then the obligation is in force and ſingle.

If *H.* be convicted upon verdict upon an information or indictment, his fine ought to be ſet in open court, and not privately in the judge's chamber.

Dr. Widdrington's *Caſe.*

Mandamus. Antea 31. 1 Lev. 23. 1 Sid. 71. 1 Keb. 2, 50, 61, 68, 79. 131, 150. 234, 458.

DOCTOR *Widdrington* having formerly brought his *Mandamus* to be reſtored to his fellowſhip in *Chriſt-College Cambridge*, and upon that the maſter, Dr. *Cudworth*, and the fellows made a return which ſeemed to the court ſufficient, and thereupon he could not obtain a writ of reſtitution; but he finding that the return was very falſe, brought his action upon the caſe, and thereupon a reference was procured to certain commiſſioners, *(viz.)* The biſhop of *London*, the lord chamberlain, and ſome of the judges; and upon hearing the whole buſineſs Dr. *Widdrington* was cleared, and awarded to be reſtored: And now he moved by *Allen*, That in regard the return was ſcandalous, and might hereafter tend * to his diſparagement, and ſince the other ſide were willing that all things before paſt might be buried in oblivion, the ſaid return might be taken off the file, which he ſaid might be, ſince all parties concerned were conſenting thereunto. But the court did ſomewhat doubt of that, they not knowing any precedent for the withdrawing any record of the court: but they made a rule, that the record ſhould be daſhed through in the nature of a cancellation; and with that *Allen* was content.

* P. 69.

Townſend's *Caſe.*

TOWNSEND having ſerved as an apprentice for ſeven years, in *Oxford*, with a tailor, his maſter refuſed to make him free; and ſerjeant *Holloway* moved to have a *Mandamus* to be directed to the mayor and others to make him free; and though at firſt it was doubted whether ſuch a writ would lie any more than for one who had ſeven years ſtudied the law to be called to the bar, yet it was at laſt agreed, becauſe it differed from the caſe of the barriſter; for in the laſt caſe there is no perſon to whom the writ ſhould be directed; but here the mayor and corporation are to be commanded to do it; and if this writ would not lie, it would be a great diſcouragement to trade; and a precedent was ſhewn, *Paſch.* 18 *Car.* in *Norwich*, of a *Mandamus* granted by *Bramſtone*. *Vide poſtea.*

Mandamus.
1 Lev. 91.
1 Sid. 107.
1 Keb. 458, 470, 659.

Manſer *verſus* Shelley.

THE plaintiff obtained a judgment in debt, and received the money, and made a letter of attorney to another that he might acknowledge ſatisfaction; and afterwards, and before ſatisfaction acknowledged, revokes his warrant: And *Allen* moved that the attorney might proceed, and that the court might ſave him harmleſs; and the court gave rule, that no proceeding ſhould be upon the judgment without motion firſt made in court for it. *Vide Latch fol.* 8.

Revocation.
1 Salk. 87.

* Wynne *verſus* Lloyd.

* P. 70.

THE dilatory pleas being now over-ruled, the plaintiff in the writ of error aſſigned errors, which were now argued.

Finch ſolicitor general for the plaintiff. Here is a recovery againſt the vouchee, who appears by attorney, and there is no warrant of attorney; And 1*ſt*, All recoveries are erroneous if the party does not appear either in perſon or by attorney, and here is no good warrant, becauſe the commiſſion to take a warrant of attorney iſſues before the ſummons *ad Warrantizandum*, which is, 1*ſt*, Contrary to the nature of a warrant of attorney to be given before plea pleaded; and a general warrant of attorney is not good. 2*dly*, It is contrary to the words of the commiſſion, which

Error.
Antea 16, 55. Poſtea 96, 134.
3 Danv. Abr. 49. p. 7.
1 Lev. 72, 130, 146.
1 Keb. 351, 388, 459, 717, 748, 869, 914.
1 Sid. 213.

ſays, that a writ of ſummons now dependeth. *Cro. Jac. fol.* 11. *Arundel* verſus *Arundel.*

2. The caption of the warrant of attorney is naught, becauſe before the commiſſion. 3. This ſhall not be ſupplied by an intendment, that there was another *dedimus*, and that this cannot be right, becauſe, 1. The writ of error commands to ſend up the record *cum omnibus ea tangentibus.*

2. 'Tis a *Dedimus* between the ſame parties.

Object. Cro. Eliz. Johnſon and *Pavie*'s caſe was objected.

Anſw. There is nothing there could falſify that intendment; but here are ſtrong preſumptions to the contrary; ſo is *Cro. Jac.* 392. *Herbert* and *Binion*'s caſe.

Williams contra. Here is a good record in a common recovery, and the errors alledged are only in the way, and proceedings thereunto. 1. Theſe errors are repugnant to the record of the recovery it ſelf, and not aſſignable, no more than that there was no ſuch perſon as the judge before whom the recovery was had. *Mich.* 38 and 39 *Eliz. Cro. Eliz.* 531. *Hebert*'s caſe. *Yelv.* 33. *Arundel* verſus *Arundel.* Then as to the errors themſelves, here are all the neceſſary parts of a recovery. As to the firſt, of a *Dedimus* being before the warant of attorney, theſe things are to be conſidered. 1. The nature of a *Dedimus*, that it is not any part of the recovery. 2. Admit it to be a part, yet it is no ſubſtantial part, and ſo helped by the ſtatute. 3. The common practice. 4. The judgments in theſe caſes. 5. The courſe in *North-Wales.* 6. The warrant here upon the roll. *As* * *to the firſt*, At common law a fine or recovery could not have been levied by *Dedimus*, for the ſtatute of *Carliſle* 15 *E.* 2. gave firſt the *Dedimus*; but that ſtatute is only directory, and at the diſcretion of the court, and 5 *Co.* 38. *a. Tey*'s caſe, and 40. *Dormer*'s caſe, where the parts of a fine are reckoned up, a *Dedimus Poteſtatem* is no part thereof; and this objection had been pertinent to have ſtopped the judgment, but now *factum valet*, as *Tey*'s caſe was. *As to the ſecond*, It is helped by the ſtatute of 27 *Eliz. cap.* 9. as a *Venire fac.* wanting, or as *Norris*'s caſe cited in *Gage*'s caſe, 5 *Co.* 45. *b. As to the third*, It is the conſtant practice. *As to the fourth*, Recoveries have always been conſtrued favourably for the upholding of them, and therefore a common recovery may be of an advowſon, 5 *Co.* 40. *Dormer*'s caſe; and yet a writ of entry will not lie thereof, 4 *E.* 3. 162. So it ſhall bind an infant, *Cro. Car.* 224. *Newport*'s caſe, and variance in a fine hurts not, *Cro. Jac.* 77. Earl of *Bedford*'s caſe. And

* P. 71.

a like

a like error in a fine alledged, and allowed well enough, *Cro. Eliz.* 275. *Argenton* and *Weſtover*. *As to the fifth*, It is the conſtant courſe in *North-Wales* to take fines before *Dedimus*. *As to the ſixth*, Here is a good warrant upon the record.

Twiſden Juſtice. There is a great difference between a fine and a recovery; for a *Dedimus Poteſtatem* is not part of a fine, but a warrant of attorney is part of the recovery; and it was adjourned. *Poſt.*

William Baily *verſus* Thomas Birtles *and* Katherine Ux. ejus, *Executrix of* Richard Baily.

Caſe. 1 Keb. 273, 395.

IN an action upon the caſe, the plaintiff declares, That he the 26*th* of *Oct.* 12 *Car.* 2. was poſſeſſed of a cow of the value of 4*l.* 10*s.* and being ſo poſſeſſed 23 *Nov.* in the twelfth year he did deliver the ſaid cow to the ſaid *Richard* in his lifetime, to keep the ſame in his paſture ſafely for the uſe of the ſaid *William*, to the ſaid *William* to be redelivered when *Richard* ſhould be requeſted; which cow the ſaid *Richard* afterwards, *(viz.)* the ſaid 23*d* of *November* did ſell and deliver to one *William Wodard* for 4*l.* 3*s.* 4*d.* and the ſaid monies did convert and diſpoſe to his own uſe; and that the ſaid *Richard* in his life-time, nor the defendant after his death *dum ſola*, nor the defendants after marriage did not pay the * 4*l.* 3*s.* 4*d.* The defendants plead that their teſtator was not guilty; the jury find him guilty *ad damnum* 4*l.* 3*s.* 4*d.* and 53*s.* 4*d.* for coſts; and in arreſt of judgment it was moved by *Bigland*, becauſe this is a tort for which the executor is not liable to anſwer, but *moritur cum perſona.* * P. 72.

Raymond for the plaintiff. I agree that things which imply a wrong in themſelves, as *actio perſonalis moritur cum perſona*, as the wrongful taking of the profits of the land, *Cro. Eliz.* 206. *Tooley* verſus *Wyndham*: ſo of an eſcape or any miſfeaſance: but for non-feaſance the executors ſhall be chargeable; as for not payment of money levied upon a *Fieri facias*, as *Cro. Car.* 539. *Dickenſon* verſus *Gilford*, this very difference agreed; for non-feaſance ſhall never be *vi & armis*, nor *contra pacem*, 9 *Co.* 50. *b. Count de Salop*'s caſe; for this reaſon an action lies againſt the executor upon 2 *E.* 6. for tithes: So this term, *antea fol.* 57. *Hole* againſt the executors of *Bradford* for fifths due to the widow of a ſequeſtered perſon. But notwithſtanding this the court ſaid it was a tort, and that the executor ought not to be charged with it. *Mes vide Sevile Rep.* 40. *difference priſe*, 3 *Leon.* 241. Sir *Brian Tuck*'s caſe.

Suit in the Eccleſiaſtical court againſt an executor, for tithes not paid by the teſtator, Regiſter Orig. 48. p. Fulbecks Tit. Prohibition, fol. 6.

Needham an Attorney of this court prayed for the filing of a *Scire facias*, which was sued forth five terms ago against the bail, and two *Nichils* returned upon the same, and he had neglected the filing of it; but the court would not grant it.

Fitch *versus* Vinor.

Case. Antea 38. Read *versus* Crapler.

IN an action upon the case, the plaintiff at the *Nisi Prius* was nonsuit, because the *Nisi Prius* roll is, That the plaintiff was in such a benefice in the year 1662. whereas the plea roll is 1626. and so the plaintiff is destitute of his proof; and now *Wild* serjeant moved to set aside the nonsuit according to *Week*'s case, *Cro. Car.* 203. and it was adjourned.

Turnor *versus* Felgate.

Intr. Trin. 1656. Rot. 130.

Execution. 3 Danv. Ab. 325. p. 2. 2 Sid. 125. 1 Sid. 107. 1 Lev. 95. 1 Keb. 453, 478, 482, 488; 822.

THE case was thus, *Felgate* recovered against *Mole*, and *Turnor* was his bail; *Felgate* obtained execution against *Turnor*, and his goods were levied; and thereupon *Turnor* moved the court, for that there was some miscarriage in the proceedings against him in obtaining that execution, because there was no *Ca. sa.* sued out against *Mole*, that the matter might be referred to Mr. *Hern* the secondary; and upon his examination he found the process unduly sued forth, and so the execution was superseded against *Turnor*, and a vacate made of it; and then *Turnor* brings trespass against *Felgate* for taking his goods, and upon debate upon a special verdict the plaintiff had judgment, and recovered damages for his goods taken; and now *Turnor* * brings a *Scire faeias* to have restitution for his goods taken upon the aforesaid erroneous execution, and for which he had already recovered damages in an action of trespass; and

* P. 74.

upon

upon motion made by *Felgate* the *Scire facias* was ſuperſeded as being a very unreaſonable thing for *Turnor* to have double ſatisfaction.

The King *verſus* Wright.

Perjury.
1 Sid. 148.
1 Keb. 531.

INFORMATION of perjury ſet forth, that Sir *John Lee* brought treſpaſs in *C. B.* for cutting of trees againſt *Garward*, and that the defendant there pleaded Not guilty; and upon the trial there the defendant ſwore that the ſaid *William Garward ultimo Junii* 12 *Car.* 2. did cut ſixty trees of the value of 80*l. ubi revera* he did not cut ſixty trees of the value of 80*l.* and verdict againſt the defendant.

Allen moved in arreſt of judgment. 1. In recital of the action brought in *C. B.* and the iſſue joined, it is ſaid that it was awarded, *Quod venire faceret hic duodecim*, which is in *B. R.* and ſo the trial was *coram non Judice*, and then no perjury can be committed. *Yelv.* 111. *Pain*'s caſe, 3 *Inſt.* 166.

2. It is ſaid, that in that action *Jurata ponitur in reſpectum coram Domino Rege*, ſo an action is begun in *C. B.* and tried in *B. R.* and it is not after a verdict, for there is no mention of a verdict to be in that action of treſpaſs, and ſo not helped by any ſtatute; and for this cauſe it was ſtaid until, *&c.* But afterwards the exceptions were overruled, and judgment againſt *Wright* to ſtand on the pillory, and be fined 20*l.*

The Earl of Stamford *verſus* Gordal.

Bail.
1 Danv. Abr. 681. p. 3.
1 Lev. 39.
1 Mod. 16.

FOSTER moved that the defendant might put in good bail to the plaintiff's action; for although the action is but for words, yet the ſame being ſpoke againſt an earl, the court may compel ſpecial bail; and it was granted, *niſi*.

Note; Juſtice *Twiſden* declared, That there is a rule made among the judges, when any one prays a *Certiorari* at a judge's chamber, to remove an indictment out of *London* or *Middleſex*, he ought to give notice of his deſire to the other ſide three days before, otherwiſe the *Certiorari* is not to be granted; and there it was queſtioned whether an inmate be a nuſance at common law.

Whitehead

* P. 75. * Whitehead *versus* Brown. *Error in the Palace Court.*

Court.
3 Danv. Abr. 301. p. 10.
1 Lev. 96.
1 Keb. 481, 512, 522.

IN an *Assumpsit* the plaintiff declares, that the defendant was indebted to the plaintiff within the jurisdiction for nursing a child; and for error it was alledged, that it is not set forth that the nursing was within the jurisdiction.

Twisden. The jury within the particular jurisdiction cannot take notice of that which was done out of it.

Wyndham. There is a difference between a debt arising upon a collateral act, and an *Indebitatus Assumpsit*; for in the later it is a debt every where, as it is a duty vested in the plaintiff.

Foster Chief Justice. In debt for money due upon the sale of an house, the plaintiff must shew that the house is within the jurisdiction; but when it is indifferent to the court, where the debt may arise, it shall be presumed to be within the jurisdiction of the court.

Twisden. Particular jurisdictions are not to be supported by implication and intendment; and it was adjourned.

Harvy *versus* Martin.

Words.
1 Keb. 485.

THE plaintiff declares, that he is, and hath been, and was such a day the master of a bark. And the defendant said to him, *Thou art a cheating knave and a cheating rogue, and thou hast cheated my son-in-law*, John Bradley, *of a cable-rope, which belonged to the bark.* On Not guilty, and verdict for the plaintiff, *Jones* moved in arrest of judgment, because the words are not applied to the plaintiff's profession as he is master of a bark, as *Hill.* 1656. *Geighton* versus *Kiffen*, of a reeder, *You cheated Mr.* Rawley *of a pannel of reed*, is not actionable. *Wyndham* seemed for the plaintiff. *Twisden.* I remember the case of the reeder. *Et adjournatur.*

* P. 76. * Wiseman *versus* Cotton. *See before*, 59.

Custom.
2 Danv. Ab. 441. p. 2.
1 Lev. 79.
1 Sid. 17, 135.
Hard. 325.
1 Keb. 288, 372, 492, 505.

ALLEN for the plaintiff. The act of 2 *E.* 6. hath taken away the custom of devising, and the custom of gavelkind is altered to all purposes, and that appears, 1*st*, From the words of the act. 2. From the meaning thereof. 3. From the construction that hath been made thereupon. *As to the first*, The words are, *That the lands be*

be clearly changed, and be no wiſe departible, and ſhall be from henceforth to all intents, conſtructions and purpoſes as lands at the common law, and as if they had been of the nature of gavelkind. As to the 2d, the meaning, every act of parliament ought to be interpreted according to the words, if there be not a particular reaſon to the contrary.

Here it is objected, That the words ſhall only refer to the partibleneſs.

Anſw. In conſtruction of an act of parliament that is moſt reaſonable which makes all the words thereof operative. 2. If that had been the meaning thereof, there was no reaſon why the words ſhould be ſo general, *(viz.) to all conſtructions and purpoſes.* 3. The meaning was, that their eſtates ſhould be altogether according to the common law, they being gentlemen, it being prejudicial, that their lands ſhould be according to the cuſtom in gavelkind; as to deviſe is inconvenient in the opinion of gentlemen of that country. And by the cuſtom of gavelkind upon a writ of right four eſſiſors ought to chooſe the grand aſſize, and not the knights. And the grand aſſize ought to conſiſt of gavelkind men. *As to the 3d,* The conſtruction and conſequence of law upon this act, 1. The cuſtom of deviſing is of the ſame nature of being endowed of the moiety, of being tenant by the curteſy without iſſue, and other cuſtoms. Now conſider the form of pleading theſe cuſtoms. The book of cuſtoms of *Kent, Vet. Magna Charta* 147. *b.* begins thus: *Theſe are the cuſtoms which the men of* Kent *do claim in their gavelkind tenure.* So that gavelkind is the mother cuſtom, *Paſch.* 4 *E.* 1. *C. B. Rot.* 2. Margeria *que fuit uxor* Johannis Daggenham *petit medietatem* of ſuch land. The defendant pleads, *Quod mulier amittet dotem ſi, &c.* The plaintiff replies, *Quod bene & verum eſt* que la eſt tiel cuſtom, mes el ne unque fuit covert *ſecundum legem de gavelkind.* The defendant rejoins, *Quod fornicata eſt.* The jury finds that it is not neceſſary by ſuch cuſtom,* and that the law of gavelkind ceaſes when gavelkind ceaſes. 2. Theſe cuſtoms are taken notice of to be incident to gavelkind, and there needs no preſcription for them, but only in gavelkind, *Fitzh. Abd* 114, 129. *Reſtal, Dower in Demand* 6. There, for the moiety of dower in gavelkind, the cuſtom is only laid in gavelkind; but it is other of dower of a moiety in a city, for there the cuſtom is more particularly alledged. *Ibid. pl.* 7. in *Norwich.* So in *Proceſs* 1, & 2. and *Voucher* 10.

* P. 77.

Object. To be indowed of a moiety is not incident to gavelkind; for in *North-Wales,* where is gavelkind land, the feme is not dowable of a moiety.

Anſw.

Anſw. There it is otherwiſe.

Object. It ought to be otherwiſe alledged.

Anſw. The gavelkind is thus pleaded, and ſo are the caſes put upon it; and the caſe 5 *E.* 4. 8. *b. pl.* 23. is miſtaken; for where it is ſaid there, *That they ought to preſcribe*, it ſhould be, *That they ought not to preſcribe*, for otherwiſe it is not ſenſe; *Quod curia conceſſit.*

Wild ſerjeant for the defendant. Where an act is dubious we ought to conſider, what was the miſchief which it intended to prevent. Now the miſchief here was the diviſion of families. 1 *Inſt.* 140. *b.*

Wyndham juſtice. If it had been the intent of the parliament to take away all gavelkind cuſtoms, they would have mentioned more than only the partibleneſs.

Twiſden accordant, and he denied the opinion of *Lambert*, *That if the king purchaſe gavelkind land, that it ſhall go to all his ſons*; for *Lambert* had it out of *Plowden* 247. *a.* from *Southcote*'s opinion; and he from 35 *H.* 6. 28. *a.*

Mallet and *Foſter* of the ſame opinion. And judgment was given for the defendant.

Nurſe *verſus* Barns.

Damages.

THE plaintiff declares, that the defendant in conſideration of 10*l.* promiſed to let him enjoy certain iron mills for ſix months; and it appeared that the iron mills were worth but 20*l. per annum*, and yet damages were given to 500*l.* by reaſon of the loſs of ſtock laid in; and *per Curiam* the jury may well find ſuch damages, for they are not bound to give only the 10*l.* but alſo all the ſpecial damages.

* P. 78.

* Par *verſus* Evans.

Court.
1 Keb. 489, 500, 515, 542, 552.

A PROHIBITION was prayed to the court of admiralty, for that the plaintiff here did ſue upon a recognizance there, taken by way of ſtipulation, by one that was but ſurety in the nature of bail; and that court not being a court of record, they cannot take any recognizance. *Noy* 24. But after long debate reſolved, in favour of trade, ſuch a ſtipulation is good, and ſhall bind the ſureties. *Vid. Godbolt* 260. *Greenway* verſus *Barker*, *pl.* 359.

Term.

* Term. Mich. 15 Car. 2. B. R. * P. 79.

Sir *Robert Hide* Chief Juſtice.

Sir *Thomas Twiſden*,
Sir *Wadham Wyndham*,
Sir *John Keeling*,
} Juſtices.

Memorandum, This laſt vacation Sir *Robert Foſter* Chief Juſtice of this court died, and the firſt day of this term Sir *Robert Hide* was ſworn Chief Juſtice.

Murch *verſus* Lands.

Trial. 1 Keb. 561, 667.

AT a trial at the *Niſi Prius* the plaintiff changed the *Venire fac.* and panel, and had a jury which the defendant knew not of, and he moved by *Jones* for a new trial. And *Twiſden* juſtice upon that cited a caſe upon a trial at *Eſſex* aſſiſes, in which the jury was changed. And reſolved by all the clerks of that court in the time of *Hoſden* ſecondary, that the defendant cannot be aided, if the firſt *Venire fac.* was not filed, becauſe the defendant may have reſort to the ſheriff and have view of the panel to be prepared for his challenges. But if the firſt *Venire fac.* was filed, then the defendant ſhall have a new trial; and after this the defendant took care to file the *Venire facias*: And upon this caſe put by *Twiſden* the court inclined againſt a new trial; but it was adjoureed to inquire of the clerks for the courſe in this court.

* Kitchin and Knight *verſus* Buckley. * P. 80.

Intr. Trin. 15 Car. 2. B. R. Rot. 1256.

Covenant. 2 Danv. Ab. 239. p. 1. 1 Lev. 109. 1 Sid. 157. 1 Keb. 565, 572. Vide Bendl. 89. Kel. 114. a.

THE caſe was, That two tenants in common bring covenant againſt leſſee for years for not repairing the

14 Jac. Jac. & C. 333

thing

thing demised, and whether they ought to sever or join was the question after verdict for the plaintiff; and the court inclined they ought to join, because it was a personal action; but it was objected, that it savoured of the realty. And where *Littleton* speaks of actions personal, it is to be intended that the action is grounded upon the contract or possession of the plaintiffs; and it was adjourned.

Afterwards *Jones* argued for the plaintiff, and cited *Littleton, Sect.* 311, 312. In all actions real tenants in common shall not join; but in personal, where damages only ought to be recovered, there they shall join, as in debt for rent; and that to *Kelw.* 114. *a.* I oppose *Pasch.* 18 *El.* 6. 6 & 7. That tenants in common may join in a forger of *Faux faits*; they shall join in detinue for deeds, 1 *Inst.* 197. *b.* And they shall join in a *Warrantia Chartæ*, 1 *Inst.* 97. and *Hill.* 28 *E.* 3. 90. *b. pl.* 12, which is intended there by *Coke*. They shall join in waste in the *Tenuit*, *Moor* 40. *pl.* 127. *Baldwin pro Defendente*. In all actions personal, where the possession is concerned, there they shall join, *Littleton, Sect.* 315. In mixt actions they may either join or sever, as in a *Parco fracto*, *Moor* 452. *pl.* 617. So in account, *Godb.* 90. *pl.* 101. So if two tenants in common make a lease for years rendering rent, and then one of them dies, the executor and the survivor shall join in debt, or they may sever at their pleasure. But if the lease be for life, they ought to sever. *Godbolt* 283. *pl.* 404. and *Dyer* 326. *pl.* 2. *Huntley*'s case. Debt by one tenant in common against lessee for years, and a demurrer upon it, and *Moor* 40. *pl.* 127. In actions that savour of the realty they shall not join, as in a *Cessavit*, nor in an assise, *Lit. sect.* 314. nor in an avowry, 317. And this action savours of the realty; and so it was ruled in *Mich.* 1657. *B. R. Baker* and *Berisford*, *Bro. Joinder in Action*, 35.

Two tenants in common may join in an action upon the case for obstructing a water-course, Noy 135. Stone *versus* Browick.

Hide Chief Justice. Although the thing of which, (*viz.*) the house, is in the realty, yet the action is not so.

* P. 81. * *Twisden* justice for the plaintiff, and also *Wyndham*; and as to *Berisford*'s case it is not law.

Kelyng justice. The case of *Littleton* is upon the personal contract; but it is a question if the tenements be conveyed over, and this contract destroyed, if the tenants in common may join. And in all cases by *Litt.* the parties are jointenants of the profits; but here it is a covenant, and this concerns the profits, and so of necessity they ought to join; and judgment was given for the plaintiff.

Pain

Pain was convicted of perjury upon an information at common law for giving evidence, and was sentenced to stand on the pillory two days, at *Westminster* and *Aldersgate-street*; and to be imprisoned a month without bail or mainprise, and fined 100*l.* Perjury. 1 Keb. 566.

Long *versus* Emot.

EJECTMENT was brought in this court, of lands in the county of *Lancaster*; and upon trial the judge at *Lancaster* assises caused the *Postea* to be marked, and to be moved in court, if it lies, the defendant being in custody; and it was adjourned. *Vid. Mich.* 2 *R.* 3. 18. *pl.* 45. *Hill.* 27 *H.* 6. 6. *a. pl.* 35. Ejectment. Postea, Nedham *versus* Benet, *Fi. fa. al Chester hors de* B. R.

Farr was indicted at common law for forgery of a warrant of attorney, and he demurred upon the indictment, and adjudged against him, and his sentence was, That he shall be set upon the pillory the first day of the next term with a paper, and then at the *Exchange*, and pay 100 marks, and imprisonment during the pleasure of the court. Forgery.

Hawes & Uxor *versus* Wheeler.

THE plaintiff brings an action in *London* for these words, *Thou art a whore and my husband's whore*, and the defendant removes this by *Habeas Corpus* into this court, and *Simpson* moved for a *procedendo*; and it was granted by three justices, *Hide* chief justice dissenting. Words. 1 Lev. 116. 1 Keb. 578.

* Some part of this term I attended in *C. B.* during which time *Bridgman* chief justice argued this case that follows. * P. 82.

Bate *versus* Amherst and Norton. *Sussex.* C. B.

EJECTMENT for lands of the demise of *Peter Underwood*. Upon Not guilty pleaded, the jury found a special verdict to the effect following: *Stephen Norton* seised in fee of the lands in question the 20*th* of *February* 1651. made his will in writing, and by it gave divers legacies, *(viz.)* 300*l. to, &c.* Item. *I give to my brother* Anthony Norton, 30*l.* per annum. Item, *I give all my land in* Kent *and* Sussex *to one of my cousin* Nicholas Amherst's *daughters that shall marry with a* Norton *within fifteen years. And I make* Nicholas Amherst *my executor. Nicholas Amherst* had three Devise. 2 Danv. Abr. 515. B. p. 6. Eq. Ab. 212. P. 5.

three daughters, *Elizabeth*, *Anne* and *Mary*; *Stephen Norton* the defendant marries *Elizabeth*; the leſſor of the plaintiff marries the heir at law. And the ſole queſtion was, if the heir at law or the deviſee ſhall have the land.

Bridgman chief juſtice. Here are two things to be conſidered, 1. Here being a deviſe to one of the daughters of *Nicholas Amherſt*, who marries with a *Norton*; if this deviſe be not void for the uncertainty; If it had been to one of the daughters without more ſaying, it had been without queſtion void, for two may marry with a *Norton*. But as to this point all agreed, that the deviſe is good notwithſtanding the uncertainty. As to the ſecond point, admitting the deviſe is good in reſpect of the perſon; yet if it be good altogether, becauſe here is an immediate deviſe to one of the daughters who marries with a *Norton*. 2. Being limited to *Nicholas Amherſt* to gather rents, &c. and then to *Nicholas* for fifteen years, and then to the deviſee that ſhall marry with a *Norton*. As to the firſt, although the words are not, *who ſhall firſt marry with a Norton*, yet it is all one with them, for theſe reaſons: Firſt the law ſupplies theſe words in a deed, 6 *Co.* 36. *b.* the biſhop of *Bath*'s caſe. 2. In the king's grants, if two conſtructions be made, and one makes the grant void, then the other ſhall ſtand; ſo here. 3. It is agreeable with the reaſon of the law, becauſe a thing which once veſts ſhall not after be deveſted. 4. *Non præſumitur pluralitas*, that more than one ſhall marry with a *Norton*, and the words in the will fix in a ſingle perſon. And there is a difference when there is incertainty in the
* P. 83. * event, and when in the perſon, as in all caſes of contingencies: And as to *Taylor* and *Sayer*'s caſe, *Cro. Eliz.* 742. that is not law. As to the ſecond point, If it had been immediately deviſed to the daughters, then if a deviſe to ſuch of the daughters as ſhould marry a *Norton* be good. 2. *Nicholas* his intereſt for fifteen years be determinable upon the marriage of one of the daughters with a *Norton*. As to the firſt conſtruction, without queſtion there may be a contingent executory deviſe without an eſtate precedent limited to that, becauſe it leaves an eſtate in the deviſor and his heirs till the contingency happen; and where it is to a ſtranger till ſuch a thing happen, there is difference betwixt them, the reaſon of law holds in both. If I covenant to ſtand ſeiſed to the uſe of ſuch a ſon as *J. S.* ſhall name, it is a good conveyance, if he nominate, 1 *Co.* 176. *b. Mildmay*'s caſe, 8 *Co.* 95. *a. Manning*'s caſe. And here it is to be conſidered if *Amherſt* had an eſtate for fifteen years, here he leaves nothing to the heir, becauſe *Nicholas* had the profits till marriage,

riage, and then to the daughter; and then it is a deviſe made to one for years, the remainder in contingency, which is void. 1 *Co.* 130. *a.* *Popham* 3. The caſe of the earl of *Bedford.* But here is a contingent certain, as 2 *Bulſtr.* 127. *Robert*'s caſe, and *Jay* and *Brown*'s caſe in *C. B.* The queſtion is if good by immediate deviſe, *Dyer* 304. *pl.* 50. A deviſe to an infant *in ventre ſa mere* is not good. So a deviſe to a college which is not yet erected, *Hob* 32. *Cunden* and *Clerk.* In an executory deviſe it is not void, but ſhall deſcend to the heir in the mean time. 1. Although in a conveyance a freehold cannot commence *in futuro*, yet in an uſe or a deviſe it may. As a deviſe or feoffment to the uſe of *A.* after my death, remainder over, is a good conveyance, becauſe it riſes out of my eſtate. *Mich.* 13 *Car.* 1. *B. R. Long* againſt *Smith.* In caſe of a deviſe, *Cro. Eliz.* 919. *Hainſworth* verſus *Pretty*, and 878. *Pain*'s caſe. Deviſe to *J. S.* for fifteen years, remainder to the right heirs of *J. D.* is not good; but for fifteen years, remainder to the firſt ſon of *J. D.* is good; becauſe the deviſor takes notice that he hath not a ſon, and intends a future act, and the law aids him which was *Inops conſilii*; ſo here the deviſor intends futurely.

As to the other point, That if it were an immediate deviſe, it is a deviſe to an infant *in ventre ſa mere* for 15 years, if it be with a remainder over it is good by way of executory deviſe. An eſtate *in futuro* and a contingent precedent makes an executory deviſe; theſe executory deviſes were grounded upon the common law, as *Goodcheap*'s caſe, 49 *E.* 3. 16. *a.* cited * in the lord *Stafford*'s caſe, 8 *Co.* 76. * P. 84. *b.* 7 *Co.* 9. *a.* 11 *H.* 6. 13. *a.* *Bro. Deviſe* 32. And the words of the ſtatute of 32 *H.* 8. are not that *H.* deviſes to any perſon or perſons, but at his will and pleaſure; and ſee *Cro. Jac.* 394. *Blandford* verſus *Blandford*; and ſo he concluded for the defendant, and judgment was given accordingly.

In the caſe of one *Ferrars*, againſt whom an information was exhibited for forgery: It was reſolved by all the juſtices, That although the jury be charged and ſworn in the caſe of a plea of the crown, yet a juror may be drawn or the jury diſmiſſed, contrary to common tradition, which hath been held by many learned in the law.

Herbert

Herbert *verſus* Tuckal. *Ejectment.*

Evidence. 2 Danv. Abr. 516. p. 5. Eq. Ab. 172. p. 4. 1 Sid. 162.

UPON evidence in a trial at bar the queſtion was, If one was of full age at the time of his will made by him. And upon evidence it appears, that he was born the 14*th* of *February* 1608, and he made his will when he was of the age of 21 years within two days; and to prove his nonage the defendant produced an almanack, in which his father had writ the nativity of the deviſor, and it was allowed to be ſtrong evidence.

The King *verſus* Burgeſs, *&c.*

Reſtitution. 1 Sid. 149. 1 Keb. 334, 343, 538, 600, 614.

ON an indictment of forcible entry removed here in *B. R.* The defendant pleads to it in bar of reſtitution the ſtatute of 31 *Eliz. cap.* 11. That *J. S.* is tenant for life of the tenements, and that he was in poſſeſſion for the ſpace of three years and more before the indictment, and that the defendants as ſervants entered as to them beſt ſeemed fit; and upon this plea the king demurs.

Winnington for the king. 1*ſt*, Here being particular eſtates ſet forth in the plea, it is not ſhewn how they commenced, which ought to have been. 2. It appears, that the parties indicted have not any eſtate, but that they are only ſervants to him who hath the eſtate. 3. They entered as ſervants, and it is not well pleaded where the command was made.

Jones for the defendant. As to the 3*d*, the conſtant pleading over-rules this; for to ſay, *That he entered as ſervant*, without ſaying *by his command*, is well enough. As
* P. 85. to the 2*d*, * they are within the ſtatute, becauſe their poſſeſſion is the poſſeſſion of their maſter, and ſo the ſtatute intends. As to the 1*ſt*, This plea is not like to a plea where a man is to derive an eſtate.

Hide chief juſtice. As to the 1*ſt*, Although it had been only ſaid, *That he was in poſſeſſion for three years*, it had been good enough. As to the 3*d*, The command is not traverſable. As to the 2*d*, There is not any acceſſary in this caſe, and the poſſeſſion of the ſervant is the poſſeſſion of the maſter.

Twiſden juſtice. To the 2*d*, A ſervant is within the ſtatute.

Wyndham juſtice accordingly, as to the 2*d*, for the reaſon aforeſaid.

aforesaid. As to the 1*st*, It is good according to the words of the statute. As to the 3*d*, It is only formal.

Kelyng justice. To the 2*d*, Here the person enters with force, and then the party ousted shall be restored, and the statute of 31 *Eliz. cap.* 11. shall be taken strictly.

Hide chief justice. Restitution doth not lie without conviction.

Twisden and *Kelyng* justices. Restitution is of duty, but re-restitution is of grace. But after resolved, that the plea was not good, because it is not said that the defendants were in possession three years before the inquisition found, according to *Dyer*.

Guilbert *and* Martin. *Covenant*.

THE action is laid in the county of *Hampshire* for not repairing of an house in *Barkshire*; and upon *Non infregit Conventionem*, a verdict was found for the plaintiff: And it was moved in arrest of judgment. And *Guidot* for the plaintiff said, Where the foundation is in one county, and the breach in another, the plaintiff hath election in which county he pleaseth to bring his action; and here is not any mis-trial, because the covenant is transitory, as in an escape. Visne. 1 Lev. 114. 1 Sid. 157. 1 Keb. 575, 601.

Sawyer for the defendant; and he cited *Bro. Visne* 19. 22 *H.* 6. 13. *pl.* 16. 16 *H.* 7. 1.

Twisden justice. The deed is now agreed to be where the plaintiff hath alledged it, and therefore good for the plaintiff.

Wyndham justice for the plaintiff. If the issue had been special the trial ought to have been in *Berkshire*; but here is matter general alledged by the defendant, and he doth not * join in a particular issue, and he may give in evidence any collateral thing. * P. 86.

Kelyng for the defendant. The thing in itself is local.

Hide chief justice. It is not a general issue, but upon a particular breach, *viz.* the repair of the house.

Twisden justice. The general issue here was *Non est factum*. And because two justices were against two, the case was adjourned.

Lee *versus* Raynes.

THE plaintiff declares, as executor of *Vavisor*, of a promise made thirteen years before: The defendant pleads *Non assumpsit infra sex annos*. The plaintiff replies, that Assumpsit. 1 Keb. 566, 578.

that he aſſumed within ſix years. The defendant rejoins, as before; and iſſue was joined upon it, and found for the plaintiff. And it was moved in arreſt of judgment, becauſe the plaintiff in his replication hath departed from his count. *Cro. Car.* 228. *Tyler* againſt *Wats.*

Hide chief juſtice, *Twiſden* and *Wyndham* juſtices for the plaintiff. Becauſe if the defendant had demurred upon the replication, it had been for the defendant; but here he hath joined iſſue, and therefore good.

Kelyng juſtice for the defendant. Becauſe the plaintiff ought to have given an account of the time betwixt the time laid in the count and the replication; but after judgment was given for the plaintiff.

Terry *verſus* Hooper & Ux'.

Words.
2 Danv. Abr. 122. p. 6. 168. p. 2.
1 Lev. 115.
2 Keb. 602, 644.

THE plaintiff declares, that he is a lime-burner, and gets his living by buying and ſelling thereof; and the defendant ſaid of the plaintiff *in arte ſua*, John Terry *is a runaway, and he is a baſe cheating rogue, and* John Terry *ſhall never think to bring* John Webb *where he is himſelf, and rather than ſo I will ſpend* 20*l.* On not guilty pleaded and found for the plaintiff, it was moved in arreſt of judgment, becauſe he doth not ſay, that the defendant ſpoke of the trade of lime-burning, but *de arte ſua* generally, and he may have another trade.

Jones for the plaintiff. In ancient time it was the conſtant courſe in declarations to lay a *Colloquium* of the plaintiff; * and it was a grand doubt if it was good without it, until *Cro. Jac.* 673. *Smith* and *Ward*'s caſe. And there reſolved *de Quer'* ſupplies the *Colloquium*, *Cro. Car.* 515. Words of an attorney in his profeſſion. And 2. lime-burner is ſuch a profeſſion of which he may be ſcandalized.

* P. 87.

Wyndham juſtice. Lime-burning is ſuch a trade of which a man may be ſcandalized, and ſo in any lawful occupation whatſoever, for it is his livelihood. 2. The flouriſhes in a declaration are of no effect, but only to aggravate damages. 3. The ſaying here *De arte ſua* are applicable to his profeſſion; and a man may ſpeak occaſionally to the prejudice of the plaintiff without having diſcourſe of his profeſſion. As if two are ſpeaking together of another, and a third perſon comes in and affirms a ſcandal of him; this is commonly the worſt ſcandal; and therefore judgment for the plaintiff.

Twiſden

Twiſden to the ſame intent.

Kelyng juſtice for the defendant: That *De arte ſua* cannot be applied to his profeſſion of lime-burning.

Hide chief juſtice for the defendant. Buying and ſelling is not incident to the art of lime-burning; and he cited a caſe in *C. B.* 1655, accordingly, and becauſe the court was divided no judgment was given.

Palmer *verſus* Fleſhees.

THE plaintiff declares for ſtopping his lights. Special verdict finds that *H.* ſeiſed of a piece of ground, and building a meſſuage upon part of it, he grants the other part of the ſaid ground to *A.* who builds upon it, and obſtructs the lights of the firſt meſſuage; and if he could, was the ſingle queſtion upon the ſpecial verdict. And by *Twiſden* and *Wyndham* juſtices, that he may; but by *Kelyng*, that he may not. *Vid. Cro. Eliz.* 118. *Bury* and *Pope*, 1 *Leon.* 168. *pl.* 234.

Caſe. 3 Danv. Abr. 421. p. 7. 1 Lev. 122. 1 Sid. 167, 227. 1 Keb. 533, 625, 704, 856.

Sir *Robert Hide*, Chief Juſtice.
Sir *Thomas Twiſden*, Sir *Wadham Wyndham*, Sir *John Kelyng*, } Juſtices.

Sharrock *verſus* Bourchier. *Probibition.*

Prohibition.

THE plaintiff ſuggeſts that in the county of *Lincoln* there is a prebend called *Langford* prebend, within the county of *Oxford*; and the prebendaries of that prebend and their farmers have had, time whereof, &c. the granting of the office of commiſſary within the ſaid prebend of *Langford*, and that Dr. *Pocklington* prebendary there made a leaſe to *Copley* of this prebend for three lives; and that the leſſee grants to the plaintiff the commiſſaryſhip; and the defendant pretends that the diſpoſal of this commiſſaryſhip belongs to the dean and chapter of *Lincoln*, who had libelled for it in the court of *Arches*, and that the freehold of it would come in queſtion.

Wyndham juſtice. The prebendary cannot grant this power to make a commiſſary over to his leſſee, no more than he may grant a thing which is annexed to his ſpiritual function.

Twiſden juſtice. Although it is not grantable, yet the freehold or power to grant is determinable at common law.

Kelyng juſtice. It may be granted by the prebendary, for it ſeems to be a peculiar, and that this office runs with the prebend which is demiſed, and is not an aſſignment of the ſpiritual function, and therefore a prohibition lies.

Hide chief juſtice. The grant of the prebend *cum omnibus advantagiis* doth not paſs this power to grant the commiſſaryſhip; but it is meerly eccleſiaſtical. And becauſe the court was divided, no prohibition was granted, but the rule was, That all things ſtay as before the motion till farther * conſideration. But after *Hide* chief juſtice ſaid, That the right of the office did come in queſtion, and upon that a prohibition was granted.

* P. 89.

Young

Young *verſus* Collet.

AUDITA QUERELA. The plaintiff declares, that whereas *John Collet* in *Hill.* 1685. brought an action of treſpaſs of aſſault and battery and falſe impriſonment againſt him to his damage of 500*l.* and had a verdict for 80*l.* damages, and 4 marks coſts, and had judgment. And by an act of parliament held 25 *April* 12 *Car.* 2. It is enacted, *That all offences, &c. viz.* The act of oblivion. And in fact ſays, that this aſſault and impriſonment was by virtue of an ordinance for the regulating the exciſe, and in purſuance of it. The defendant pleads that it was not in purſuance of that ordinance; and found for the plaintiff. Audita Querela. 1 Keb. 264, 556, 634, 640.

Widdrington ſerjeant moved in arreſt of judgment, that an *Audita Querela* lies not in this caſe; for it is ſaid by *Stoner* 27 *E.* 3. that an *Audita Querela* is a new kind of action, and that it commenced only 10 *E.* 3. and not before. And it doth not lie where there is any other remedy at law for the plaintiff, either by plea or otherwiſe. And here the plaintiff might have pleaded this ordinance, by virtue of which he juſtifies the impriſonment in evidence upon the trial, 1655. upon the meal act, and no *Audita Querela* lies where remedy may be had in another manner. 1 *Inſt.* 290. *b.* Sometimes an Audita Querela doth not lie although there be not any other remedy. Dyer 263. pl. 75. Cro Jac 694. Alleby *and* Colley.

Wild ſerjeant for the plaintiff. The meal act doth not appear to the court, nor can the court take notice of it; and this writ is grounded upon an act of parliament ſubſequent.

Kelyng juſtice. The intention of the act of oblivion was to prevent new animoſities, but for thoſe things that were reduced to judgment, it was not intended that they ſhould be undone, and therefore an *Audita Querela* doth not lie.

Twiſden juſtice. It ſeems that the defendant hath waived this exception; but if he had demurred upon the count it had been for him without queſtion.

Wyndham. The act of oblivion is more comprehenſive than any courſe before.

Hide chief juſtice. The act of oblivion only diſcharges acts of hoſtility, and not judgments obtained for ſuch acts. And it was adjourned.

* P. 90.

* Carpenter *versus* Marshal.

Attornment. 1 Danv. Ab. 613. G. p. 1. 614. p. 11. 1 Lev. 28. 1 Sid. 189. 1 Keb. 643, 713.

EJECTIONE *firmæ* at the bar, of a lease by *Philips*, dated the 5*th* of *April* 1659. The defendant pleaded Not guilty. The plaintiff made title, that the land in question is dutchy land lying out of the county palatine, and there was a lease for years made of it to *A.* rendering rent, and shews a grant of the reversion the 7*th* of *Jac.* to *Ferrers* and *Phillips* under the great seal, county palatine seal and dutchy seal, and that *Phillips* survived, and the rent was constantly paid to him during the lease, which ended in the year 1658. and in the year 1659. *Phillips* made the lease *ut supra*. The defendant shews a patent 8 *Car.* 1. to him, reciting that former patent to *Ferrers* and *Phillips*, and that it was void, because it passed only an interest in reversion, and no attornment had, and so grants the reversion to the defendant; and this being doubtful whether the former patent were good to pass the estate without attornment, and that upon *Co.* 4. *Inst.* 209, 210. it was found *specially*; the only question in this case being, Whether attornment was necessary or not in this case.

Jones for the plaintiff. That the grant is good without attornment. 1. Some things are to be premised concerning the three seals here, the seal of the dutchy is pleaded, *Rastal's Entries* 524, and 636. But by the statute of 37 *H.* 8. *cap.* 16. Lands lying out of the county palatine shall pass under the dutchy seal. By the common law lands coming to the king in his natural capacity participate of the prerogative, *Plow.* 213. *a.* and *b.* And now it is to see if the statute of 1 *H.* 4. hath altered this; and it seems it hath not, the words are, That the lands *taliter & tali modo pertractentur, &c. sicut pertractari deberent si ad Culmen dignitatis Regiæ assumpti minime fuissemus.* The ends of this statute were, 1. To preserve inheritances. 2. To preserve the reputation: and yet to more purposes the lands partake of the prerogative where the ends are not crossed; as the king within age may grant them: So to have aid, *Plow.* 221. *a.* before issue joined, *Cro. Eliz.* 240. Double usurpation doth not put the king out of possession of a church he hath in the right of his dutchy. As to livery, 21 *E.* 4. 60. *a.* 26 *H.* 8. 9. the reason of that is, That it is a privilege adherent to his person, and cannot be separated, as livery, tender of a ring, demand of rent, *&c.*

1 Leon. 151. The lord Howard *and* the town of Walden's case.

* P. 91.

* 2. If these lands do not pass without attornment, the king will be in a worse condition than a common person, for

for a common perſon may compel the tenant to attorn, but the king cannot; for a *Quid Juris clamat* doth not lie for the king, becauſe a fine by the king is always by render, 6 *Co.* 68. *a.* If a fine be levied to an uſe, the *Ceſtuy que uſe* ſhall have the rent without attornment, 4 *Inſt.* 210. It is ſaid that the tenant is compellable by Engliſh writ; but this only forces the perſon, and impriſons him, but does not paſs the land it ſelf. And as to that that is ſaid, that it hath been uſed; There cannot be an uſage time without memory, *&c.* becauſe it begins ſince 1 *H.* 4. For authorities in the caſe, there is *Co.* 4 *Inſt.* 209. and ſo concluded for the plaintiff. Co. 7. Rep. 32.

Weſton for the defendant. Attornment is as neceſſary as livery, and no difference betwixt them; and ſo are the books 21 *E.* 4. 60. 26 *H.* 8, 9. The reaſons of attornment are, 1. Notoriety. 2. Election of the tenant of his landlord, *Moor* 153. In *Bonnie*'s caſe; by *Beaumont* attornment ought to be: And the ſtatute of 2 *&* 3 *Phil. & Mariæ, cap.* 20. ſaith, That the lands there annexed ſhall paſs by attornment, *&c.*

Kelyng juſtice. No difference betwixt livery and attornment in this caſe.

Twiſden. *Coke*, when he delivers the opinion in 1 *Inſt.* well knew how theſe lands ſhould paſs out of the crown, being attorney general; and it is the conſtant courſe that no attornment ſhall be adjoined. But afterwards it was adjudged for the plaintiff, for they were guided by precedents; for *Twiſden* and *Wyndham* ſaid, That if it were *res integra* they could not find any reaſon why attornment ſhould not be as well as livery upon a feoffment; but becauſe the precedents are contrary, judgment was given for the plaintiff.

Ford *verſus* Welden.

IN a prohibition the plaintiff ſuggeſts, that the defendant libelled for defamation in the court of Arches, and he is an inhabitant within the dioceſe of *London, contra formam Statuti* 23 *H.* 8. *cap.* 9. Ordinary. 1 Keb. 638, 647, 651, 669.

Powis for the defendant, That a prohibition ſhall not go; he cited *Cro. Car.* 339. *Gobbet*'s caſe, where a prohibition in ſuch caſe was denied, becauſe there had been a compoſition betwixt the biſhop of *London* and the archbiſhop, for ſuch * juriſdiction; and the archbiſhop doth not viſit in the dioceſe of *London* for that cauſe. * P. 92.

Kelyng

Kelyng juſtice. The dioceſe of *London* is not within the juriſdiction of the Arches, but the archbiſhop hath a peculiar juriſdiction there, conſiſting of 14 pariſhes, *Co.* 13 *Rep.* 4. and the miſchief here was intended to be prevented by the ſtatute; and ſo is *Mich.* 5 *Car.* 1. *Cro. Car.* 162. *Cadwalder* verſus *Bryan*, *Hob.* 185. *Jones* verſus *Jones*; and therefore a prohibition lies.

Wyndham. A prohibition doth not lie, becauſe the Arches is within the dioceſe of *London*; and if there be any cauſe to remit the juriſdiction of the biſhop of *London* to the Arches, it ought to be determined by the civilians, according to the ſtatute; and the compoſition mentioned in *Gobbet*'s caſe amounts to a licence.

Twiſden juſtice. A prohibition lies. Although there was a compoſition before, yet now the ſtatute takes it away, and the agreement betwixt the ordinaries cannot prejudice the people for whom the ſtatute was made; and as to *Gobbet*'s caſe, the reaſon there is not good, for the biſhop of *London* cannot agree that the archbiſhop ſhall not viſit; and 2*dly*, The compoſition intended ought to be pleaded.

Hide chief juſtice. A prohibition doth not lie; and he affirmed that ſuch writ is *ex gratia*, and not *ex debito Juſtitiæ*; but *Kelyng* and *Twiſden* poſitively denied that; and becauſe the court was divided the matter reſted as before.

Townſend's *Caſe*.

Mandamus. Antea 69. 1 Lev. 91. 1 Sid. 107. 1 Keb. 458, 470, 659.

THE mayor and commonalty of *Oxford* return to a *Mandamus* to them directed, That if any perſon binds himſelf to be an apprentice, it is by the courſe of their corporation to be inrolled, and that the ſaid *Townſend* by indenture obliged himſelf to be an apprentice to one *Colley*, by which he covenanted that he would not contract matrimony during his apprenticeſhip, and that the ſaid indenture was inrolled according to the ſaid uſage; and that the ſaid *Townſend* within the firſt two years of his apprenticeſhip did marry, and after this he ſerved rather as a journeyman than an apprentice. And to this return *Holloway* took exceptions; 1. Although he covenants that he will not marry, yet if he marry, this is only a breach of his covenant, but not any cauſe to bar him of his freedom. 2. The return that he * ſerved rather as a journey-man than as an apprentice is uncertain and not poſitive; and for this cauſe the writ of reſtitution was awarded.

* P. 93.

Sands's

Sands's *Case.*

THE eldeſt ſon of Sir *George Sands* having a wife dies inteſtate, and adminiſtration is granted by the prerogative court to Sir *George Sands* as the next of kin; and now the wife libels in the eccleſiaſtical court to repeal theſe letters of adminiſtration, and to grant them to her; and Sir *George* upon this moves for a prohibition; and the court granted it; and reſolved by the ſtatute of 21 *H.* 8. it is in the election of the ordinary to grant adminiſtration to the wife, or to the next of blood. 2. The father is next of blood; and the caſe of my lord *Brook* cited in *Ratcliff*'s caſe is not law. 3. When the ordinary hath once granted adminiſtration, he cannot repeal that, and grant it to another, becauſe he hath executed his power. *Cro. Car.* 49. *Fotherbie*'s caſe.

Adminiſtration. 3 Danv. Abr. 407. p. 1. 1 Sid. 179, 403. 1 Keb. 667, 683. 3 Salk. 22.

Keys *verſus* Braydon. *Error in* Ireland, *Ejectment.*

THE plaintiff obtains a judgment againſt his own ejector, in a caſe where an infant was in poſſeſſion; and the party concerned in the land brings a writ of error in the name of the feigned defendant. The plaintiff pleads in the writ of error the releaſe of the defendant; and the court held ſuch releaſe ſhall not be allowed. And the court will not permit the party to proceed to try the iſſue if the releaſe be good or not, becauſe it is to bar the right of a third perſon.

And *Hide* chief juſtice ſaid, That ſuch releaſe was offered in *C. B.* in a caſe between the lord *Leceiſter* and the lady *Holburn*, and the court of *C. B.* refuſed to allow it.

Error. 1 Keb. 705, 740. 755.

* Hurſt's *Case.*

* P. 94.

A MANDAMUS was granted in the caſe of *Hurſt* to reſtore him to the place of an attorney in the town-court of *Canterbury*, and upon the return of the writ, reſtitution was granted, becauſe an attorney is not ſuch an office of which the commiſſioners for corporations have a power to intermeddle.

Mandamus. Antea 56. 1 Lev. 75. 1 Sid. 94, 152. 1 Keb. 349, 354, 387, 55 675.

Morgan

Morgan *verſus* Man.

Award.
1 Lev. 127.
1 Sid. 180.
1 Keb. 678.

DEBT on an obligation. The defendant demands oyer of the condition, which is to perform an award; and then pleads *Nullum fecer' Arbitrium*. The plaintiff replies, and ſets forth the award, and aſſigns breach for non-payment of the money. The defendant rejoins, That one *Anne Collins* the teſtatrix of the plaintiff recovered againſt him on a judgment in an action of battery and falſe impriſonment, and this judgment was one of the cauſes ſubmitted, and the arbitrators had notice of it, and they did nothing concerning it. The plaintiff ſurrejoins, That the award was as well concerning that judgment as of other things betwixt them; *& hoc paratus eſt verificare*. The defendant demurs; and *Jones* for the defendant, Here the plaintiff ought to have concluded to the country, and not to have ſaid, *Et hoc paratus eſt verificare*, for here is an affirmative and a negative, which make a good iſſue, which may be tried.

Wild ſerjeant for the plaintiff. 1. This is aided upon a general demurrer, becauſe only matter of form. 2*dly*, Here is a departure, becauſe the defendant cannot rejoin concerning an award, when he hath pleaded before that there was no award; and upon debate it was reſolved, This is a departure, and therefore adjudged for the plaintiff; but the ſaying, *Et hoc paratus eſt verificare*, where he ought to have concluded to the country, is matter of ſubſtance; but for the departure judgment was given for the plaintiff.

P. 95.

* Wilks *verſus* Ruſſel.

Prohibition.

IT was moved for a prohibition to the ſpiritual court. The plaintiff ſuggeſts, that the defendant ſued him being executor, for tithes, and to have double damages, which doth not lie againſt an executor.

Kelyng juſtice. If by the common law an executor ſhall not be charged, if the ſpiritual court will ſue him; there a prohibition lies, becauſe it expoſes the executor to a *Devaſtavit*; but the reaſon of *Kelyng* was diſallowed, and a prohibition was denied. *Vide Fitzherbert's Nat. Br.* 51. *Roll*, 1 *Part*, 919.

The Judges being

Sir *Robert Hide* Chief Juſtice.

Sir *Thomas Twiſden*,
Sir *Wadham Wyndham*,
Sir *John Kelyng*,
} Juſtices.

Memorandum, This term died Sir *Thomas Widdrington* Serjeant at Law, who was of *Gray's Inn*, and by birth, of the county of *Northumberland*.

Theodorus Humfrys one of the clerks of Mr. *Paget*, *Cuſtos Brevium* of this court, complained of the ſaid *Paget* for hindering him to take Clerks Fees due to him for tranſcribing Records of *Niſi Prius* for the Weſtern Circuit: And the Court ordered *Paget* to refund upon Account, or elſe to be committed.

It is a Rule of this Court, That if Bail be put in before a Judge, the Plaintiff hath twenty days to accept or diſallow of it, and after that to file it under the pain of ten Shillings.

Wynne *verſus* Lloyd.

JONES for the defendant. A vouchee may appear in perſon, *Fitz. Voucher* 230. and he may come in by attorney *gratis* without a ſummons *ad Warrantizandum*, *Trin.* 22 *E.* 3. 7. *b. pl.* 2. *Fitzh. Voucher* 197. *Trin.* 13 *H.* 7. 24. *pl.* 1. A caption before the time that it ought to be taken, is good enough. *Hutt.* 135. *Champernon's* caſe. And afterwards judgment was affirmed by all the judges, becauſe it was reſolved a good warrant of attorney. *Poſt.* Error. Antea 16, 55, 70, 96. Poſtea 134.

Bowman

*P. 97. * Bowman *verſus* Milbanke.

Deviſe. 2 Danv. Abr. 527. p. 16. Eq. Ab. 207. p. 1. 1 Lev. 130. 1 Sid. 191. 1 Keb. 719.

UPON a ſpecial verdict found, &c. *(viz.) I give all to my mother, all to my mother*; and reſolved lands do not paſs by theſe words, by the whole court.

Brocket in ringing was taken up by the bell-rope, and by it he was killed; and now the coroner took an inquiſition upon his death, and found the bell to be a *Deodand.* And *Siderfin* for the church-wardens moved, That the bell is not to be a *Deodand*, becauſe a bell is already given to God and to the church. And bells were invented about the year of our Lord 400. by *Paulinus* a biſhop here; and by *Hide* chief juſtice, the caſe of *Fitzh. Corone* 389. of a mill-wheel, is not law. And it was adjourned. *Vide Stamf. Placit. Corone, lib.* 1. *cap.* 12. *fol.* 20. *a. Fitz. Corone* 405.

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*P. 98. * Term. Trin. 16 Car. 2. B. R.

Charleton *verſus* Finney.

Pleading. 1 Sid. 215. 1 Keb. 759, 766. Dyer 121. a. pl. 14. 3 Leon. 90, 129. Bunny *verſus* Bunny. 2 Roll. Rep. 63. Gray *verſus* Gray.

IN debt upon an obligation, the condition was, That if he paid all ſums which ſhould be expended about, &c. that then, &c. The defendant pleads that he paid all. The plaintiff replies he had not paid all; *& hoc paratus eſt verificare.* The defendant demurs generally, and alledged for the defendant, That the plaintiff ought to have concluded to the country in his replication, becauſe there is a affirmative and an negative; for otherwiſe there ſhall never be an end of pleading, but it ſhall be infinite; and ſo is *Cro. Car.* 164. *Duncomb* verſus *Smith*, and *Yelv.* 137. *Alexander* verſus *Lane.* And of this opinion was all the court. And *Twiſden* put a difference when the plea is involved, and when it is direct.

Leech

Leech and five others being of the jury at *Juſtice-Hall* in the *Old-Baily* this laſt ſeſſions, refuſed to find certain Quakers guilty according to their evidence, and upon this they were bound to appear here this firſt day of the term, and they appeared accordingly, and the court directed an information to be drawn againſt them, and upon that they were fined. *Vide* the ſame caſe, 3 *Leon.* 147. *Vide poſtea* 138. The King againſt *Wagſtaff.* Jurors.

Note; 1 *H.* 8. It was laid to *Empſon*'s charge, That he being recorder of *Coventry*, and there ſat with the mayor and other juſtices of the peace upon a ſpecial gaol-delivery within that city, on the *Monday* before the feaſt of St. *Thomas* the apoſtle, 16 *H.* 7. A priſoner that had been indicted of felony, for taking out of a houſe in that city certain goods to the value of 20*s.* was arraigned before them, and becauſe the jury would not find the ſaid priſoner guilty for want of ſufficient evidence (as they after alledged) the ſaid Sir *Richard Empſon* ſuppoſing the ſame evidence * to be ſufficient, cauſed them to be committed to ward, * P. 99. wherein they remained four days together, till they were contented to enter into bond in 40*l.* a-piece to appear before the king and council 15 *Hill.* whereupon they keeping their day, and appearing before the ſaid Sir *Richard Empſon* and other of the king's council according to their bonds, were adjudged to pay every of them 8*l.* for a fine, and accordingly made payment thereof, as they were then thought worthy ſo to do. But after at a ſeſſions holden at *Coventry* 1 *H.* 8. an indictment was framed againſt him for this matter, and thereof was found guilty, as if therein he had committed ſome great and heinous offence againſt the king's peace, his crown and dignity. *Hollinſhed, part* 2. in the time of 1 *H.* 8. *fol.* 804. and *fol.* 1104. in the caſe of Sir *Nicholas Throckmorton*, 1 *Mar.*

Note; Before *Weſtm.* 2. *cap.* 30. Some juſtices are ſaid to rule over the recognitors of aſſize, and made them give a preciſe verdict without finding the ſpecial matter. 2 *Inſt.* 422.

Term.

Adams *verſus* Tomlinſon.

Debt.
2 Danv. Ab. 499. p. 9.
1 Lev. 153.
1 Sid. 236.
1 Keb. 827.

JUDGMENT was given for the plaintiff in *B. R.* upon which the defendant brought a writ of error in the Exchequer-chamber, and after the writ of error brought, the plaintiff in the firſt action brings an action of debt upon the judgment, to which the defendant pleads *Nul tiel Record.* And reſolved the plea is naught; for notwithſtanding ſuch a writ of error an action of debt lies upon the judgment, as *Dyer* 32. *b. pl.* 5. and 6. and 18 *E.* 4. 7. But *Bendl.* 20. *pl.* 31. takes this difference, That when the action of debt is brought before the writ of error, the action continues good. But if the writ of error is firſt brought, debt does not lie; but in *Limbry* and *Langham*'s caſe the judges held it was all one, and that a writ of error is not any *Superſedeas* to an action of debt; and that notwithſtanding the writ of error, the bail may bring in the principal in diſcharge of the mainpernors.

Clerk *verſus* Molineux.

Eſcape.
3 Danv. Ab. 117. p. 8.
1 Lev. 159.
1 Sid. 269.
1 Keb. 845.

IN an action upon the caſe for an eſcape againſt the ſheriff of *Nottingham*. The defendant pleaded, That during the time the priſoner was in his cuſtody he received a writ of privilege from the marqueſs of *Newcaſtle*, reciting that he was a juſtice of peace of the ſaid county, and *Cuſtos Rotulorum*, and that the ſaid priſoner was convened before the juſtices at the quarter-ſeſſions, and that by the law of *England* the priſoner ought not to be moleſted *eundo & redeundo* during the time that he had cauſes there depending, and commanded the ſheriff to diſmiſs him, which the defendant accordingly did. To this plea the plaintiff demurred; and it ſeemed an ill plea, becauſe the juſtices can't cauſe an arreſted perſon to be diſmiſſed. *Vide Browl.* * *l.* 1. 15. *Wilſons* againſt the ſheriffs of *London*, where the court held, that if a man was arreſted in the face of the court, the court had power to diſcharge him, but not otherwiſe.

* P. 101.

Patrick's

Patrick's *Case*.

A WRIT of *Mandamus* was directed out of the King's Bench to *Richard Bryan*, the ſenior fellow of *Queen's College* in *Cambridge*, to admit and pronounce *Simon Patrick* preſident of the ſaid college, being *Debito modo electus* preſident, or to ſhew cauſe to the contrary. After an *Alias* and *Pluries Richard Bryan* makes this return: viz. That king *H.* 6. 30 *Martii* 26*th* of his reign, by letters patent under his great ſeal of *England*, gave licence to *Margaret* queen of *England* his conſort, that ſhe might found a college to conſiſt of one preſident and four fellows (more or leſs, as the revenues of the ſaid college ſhould happen to fall out) in the univerſity of *Cambridge*, and aſcertains the place *ad ſtudendum & orandum*. Which preſident and fellows for the time being, according to ſuch ſtatutes as the biſhop of *Coventry*, *John Somerſeth*, chancellor of the Exchequer, and others whilſt they lived, or the greater part of them ſhould live, ſhould make, ſhould be governed, puniſhed and deprived. That *Andrew Ducket* ſhould be the firſt preſident, and names the other four fellows, clerks. That the ſaid preſident and four fellows may afterwards admit more fellows. That the name of the college ſhall be *Reginale Collegium Sanctæ Margaretæ & Sancti Bernardi in Univerſitate Cantabrigiæ*. That 15 *April* 26 *H.* 6. *Margaret* founded the college accordingly, and made the ſaid *Ducket* preſident, and the other four fellows, and that they might chooſe others. The biſhop of *Coventry*, *Somerſeth* and the others before appointed, make and ordain ſtatutes and orders; amongſt which they ordain, 1. That the college be called *Queen's College*, and that in the ſame be one preſident, whom all others *in omnibus licitis & honeſtis* muſt obey. That there be nineteen fellows, whereof every one muſt take holy orders within two years after they become maſters of art, unleſs the preſident and greater part of the fellows ſhall give them longer time. 2. That none of the fellows ſow diſcord, and if any be found ſo doing, they injoin the firſt time admonition by the preſident or his deputy; the ſecond time by the preſident and two fellows; the third time expulſion. And if * diſcord ariſe between the preſident and the fellows, or any of them, the preſident muſt call the fellows together three ſeveral times in three days ſpace; and if they cannot compoſe the differences, then as well the preſident as the fellows are bound to ſtand to the award of

Mandamus. 1 Lev. 65. 1 Sid. 346. 1 Keb. 289, 294, 298, 551, 610, 665, 835. 1 Keb. 65, 164, 259. Hollingſhead fol. 765. l. 2. *dit que le feme de E. 4. erect ceſt College.*

* P. 102.

of the chancellor, and the greater part of the *præpoſiti* of the colleges, under pain of expulſion. That king *James* 9 *Martii* 3 *Jac.* confirmed all former charters and grants to the univerſity and ſcholars of the ſame. And farther, that the chancellor of the ſaid univerſity for the time being (if within the town or ſuburbs) or in his abſence, the vice-chancellor, *per Cancellarium Univerſitatis prædictæ in ea parte deputat' ſive appunctuat'*, ſhould be ordinary viſitor (where no ſpecial viſitor was nor ſhould be otherwiſe appointed) of all colleges and halls in the ſaid univerſity. That no ſpecial viſitor is appointed of this college. That Dr. *Edward Martin* late preſident died 7 *April* 14 *Car.* 2. and that ever ſince *Edward* earl of *Mancheſter* hath been chancellor, and out of the town of *Cambridge* and ſuburbs theſeof. That Dr. *Dillingham* is his vice-chancellor. That the town and univerſity of *Cambridge* are within the dioceſe of the biſhop of *Ely*. That at the death of Dr. *Martin*, and ever ſince, *Mathew Wren* was and hath been biſhop of *Ely*. That *Simon Patrick* hath not made his appeal to the chancellor, vice-chancellor or biſhop, and therefore he the ſaid *Richard Bryan* cannot admit or pronounce the ſaid *Simon Patrick* preſident.

Maſters pro Patrick. I conceive the return to be inſufficient, and the ſtatutes of the college recited are not material, and the letters patent are not well applied. 1. It is ſaid *That the college is within the dioceſe of the biſhop of Ely*; but it is not ſaid, *That it is within the juriſdiction of the biſhop*; and it may be within a peculiar of the dioceſe, in which the biſhop hath nothing to do. 1. A college is a temporal corporation, *Coke ſur Litt.* 250. *a. Dyer* 255. *b. Finch.* 92. 2. A college is temporal, *viz. To pronounce him preſident. Dyer* 209. Deprivation is a temporal act, *Et contrariorum eadem eſt ratio.* And it is not requiſite that the preſident be in orders. 44 *Aſſ.* 9.

Object. This college is founded *ad ſtudendum & orandum*, which implies that it is ſpiritual.

Reſp. Coke ſur Lit. 342. *a.* An hoſpital, though founded *ad orandum*, is lay, for every one is bound to pray; and *ad ſtudendum* doth not refer to divinity. And the fellows here are to enter into orders, but it doth not here appear that the fellows are in orders.

* P. 103. * *Object.* An impropriation cannot be to a lay corporation, but it may be to a college.

Reſp. It may be to a nunnery, *Plowd.* and yet that is no ſpiritual corporation. And this court is the proper place for redreſs and examination of this matter, becauſe otherwiſe

wiſe here would be a failer of juſtice. *Co. Inſt.* 4. 71. And here can be no prejudice to any one by allowing a *Mandamus*; for notwithſtanding ſuch a writ, the party grieved may try his right, *viz.* the party whom the ſeignior fellow hath already admitted preſident.

Authorities in the caſe are theſe; *Fitz. Aſſiſe* 150. 8 *E.* 3. 69. 9 *H.* 6. 32. *Dyer* 209. 6 *H.* 7. 14. In the caſe of a free chapel. So in caſe of the granting of letters of adminiſtration, *Luſkin* verſus *Carver*, *Style's Rep.* And in caſe of the uſher of a grammar ſchool, *Crayford's* caſe; and ſo prays a *Mandamus*.

Brampſton contra. This college being founded for a ſpiritual end is a ſpiritual corporation, *Linwood* 111, & 155. The orders of the *Carthuſians*. 8 *Aſſ. pl.* 29 & 31. *L.* 5 *E.* 4. 127. and *Allen* and *Naſhe's* caſe.

Jones pro Patrick. This return is inſufficient, becauſe it doth not contain an anſwer to the writ; for the return ſays that Mr. *Patrick* hath not appealed; but ſhews no cauſe he ſhould appeal, 34 *H.* 6. 41. but in truth, the return is to the juriſdiction of the court. I ſhall conſider the return in two points, 1. As without reference to the letters patent, and 2 What influence the letters patent have upon the ſame.

As to the 1*ſt*, The king gives licence to the queen to erect a college *ad ſtudendum & orandum*, and no viſitor is appointed; and whether there be any remedy in this court to reſtrain a grievance, is the queſtion. This court hath juriſdiction to reſtrain and take cognizance of all miſdemeanors extrajudicial. *Co.* 11. 98. *Bagg's* caſe. 1. If there be no remedy for this here, there is remedy no where.

Object. Mr. *Patrick* ought to appeal to the viſitor.

Reſp. It doth not appear by this return that there is any viſitor. And 1. The foundation doth not appoint any viſitor. And 2. The law doth not appoint the founder to be viſitor; and if it did, queen *Margaret* the foundreſs here was a foreigner and died without iſſue: And we ſhall not intend any viſitor when 'tis not mentioned, becauſe a return ought to be certain, and is not to be conſtrued by intendment, for the party cannot reply to it.

* *Object.* The ordinary of the dioceſe is viſitor. * P. 104.

Reſp. 1. There is no authority in our law for that, in caſe of a college. 2. The experience in the univerſity is totally againſt it; for the biſhop appoints viſitors, but not the biſhop of the dioceſe. 3. When the letters patent recited in the return were made, the law was not ſo taken, for 'tis added as a ſupplement, who ſhall viſit. 4. The nature

nature of this corporation doth not allow the bishop to be visitor; for I take it for a rule, that where the head of the corporation is constituted without the concurrence of the ordinary, there the ordinary hath no jurisdiction, be the corporation spiritual or temporal. 1. For a spiritual corporation, as an hospital. *F. N. B.* 42. *b.* 50. *p.* In case of a free chapel the ordinary shall proceed *per panam corporalem & non pecuniariam.* The king's chaplain may be visited as a private person, but not in his politick capacity 6 *H.* 7. 7. He cannot visit a chaplain, because he comes not in by his act. In case of a dean, *in temps Ed.* 6. *Br. Præmunire* 21. In case of an abbot, 9 *H.* 6. 32. If he comes in by election without the concurrence of the ordinary. 2. For a temporal corporation, it is plain; and here this college is not a spiritual corporation, because neither the persons nor employment are spiritual. The president is not to be in orders; the employment *ad studendum & orandum*; all learning; *ad orandum.* So must all lay professions, hospitals, a private school, a workhouse is *ad operandum & orandum.* It is the duty of every one.

As to the 2*d*, Let us consider what influences the letters patent have in this case; I conceive they alter not the use. 1. Here are no restrictive or negative words, as to the jurisdiction, as in act of parliament, or as in the grant of conusance of pleas, *Ita Quod nullus Justiciarius se intromittat.* 2. It doth not appear that there was any visitor at the time of the return. The vice-chancellor ought to be thereunto appointed, and he doth not visit *quatenus* vice-chancellor.

Object. A presidentship of a college is not an office of a publick nature.

Resp. *Bagg*'s case is, that this court hath conusance of all wrongs, be they private or publick. 2. But then is of a publick nature more than the petty corporations in *Cornwal*, or any petty borough.

And for authorities, there was no precedent for *Bagg*'s case; but the judges finding the mischief, did out of the foundation of law frame that writ; and here the president cannot have an assise, and therefore ought to have this writ.

* P. 105. * *Finch* solicitor general *contra.* I agree the power of this court to be very great, and *Bagg*'s case taken *cum grano salis* is good law. But in all cases where the foundation of a corporation is eleemosynary (be it lay or spiritual) the ordinary is visitor thereof. *Lindwood cap. de Religiosis Domibus Verbo Ordinarius. Locus pius non potest fundari eo modo quod non possit Episcopus se intromittere.* And if the ordinary is not,

not, then the founder is visitor; and if neither, then the king, as fountain of authority; and if so, then the king grants this authority by his letters patent. A man cannot resort to this court, but either it must be *per saltum* or *per gradus*, *Hob.* 23. Dr. *James*'s case, and *Kenne*'s case. Deprivation is not questionable here, and 13 *Jac. Huntley*'s case. The consequence is great. Where the founder names a visitor and prohibits appeals from him, yet an appeal from the visitor is not restrained. *Magdalen* college in *Oxford* is so founded, *Absque ullo Appellationis remedio*; and resolved *inter* Dr. *Pierce and* Dr. *Turbury*, such clause doth not restrain an appeal from the visitor; although it was there objected, that he might come into this court, but resolved he ought to resort to the visitor, and the words are contrary to common right. See the clause of *Omni appellatione remota*, *Co. Inst.* 4. 340.

Raymond pro Patrick. I shall waive the exceptions to the form of the return, which is at the best but argumentative; and out of which the consequence intended cannot without much incertainty be deduced, to wit, That the college is within the jurisdiction of the bishop of *Ely*, therefore not within the jurisdiction of this court of *B. R.* For a man in some cases may have redress in both jurisdictions *F. N. B.* 51. *b.* He may sue here and there for a pension; and that it is within the diocese of the bishop, therefore it must be within the jurisdiction, whereas it may be within some peculiar. Such a return by a sheriff hath been resolved naught, as *Plowd.* 14. *a. Manxel*'s case. In *Habere facias seisinam* the sheriff returns, that another is tenant of the land, and so he cannot give possession without trespass, it is no good return. But I shall waive these exceptions, and speak only to the main point intended in the return, which is this, That this college is within the jurisdiction of the bishop of *Ely*, who is proper ordinary, and that Mr. *Patrick* ought to apply himself to the bishop and not to this court, which in short is, That the bishop of the diocese, where no special visitor is appointed, is *de communi jure* visitor of colleges in the universities. In examining of which point, as to our case, * I shall humbly crave leave to premise three things, which I conceive will be granted me on the other side, for they are very plain. * P. 106.

1. Upon the whole record, upon view of the writ and of the return thereof together, it doth most plainly appear to the court, that the plaintiff Mr. *Patrick* is greatly injured, and that by the defendant Mr. *Bryan*, and so deserves no more favour than a *Tort-feasor*; for the plaintiff by the writ

 suggests,

ſuggeſts, *Quod debito modo electus fuit Præſidens ejuſdem Collegii, & in locum Præſidentis Collegii prædicti admitti ſe obtulerit*; and that notwithſtanding, *Richard Bryan* the defendant being ſeignior fellow, *& cui pertinet Præſidentem ſic electum pronunciare, & perſonam ſic electam admittere, & facere electum Præſidentem jurari & coram communitate Collegii in Capella ejuſdem ad menſam Domini perſonaliter præſentari, prædictum* the plaintiff *in Præſidentem admittere renuit.* The defendant returns, The foundation of the college, and ſome certain ſtatutes (ſo many as he thinks make for his turn) the letters patent, and that the college is within the dioceſe of the biſhop of *Ely*, *&c.* and ſo he cannot admit him; but not one word that the plaintiff was not duly elected, nor that Mr. *Bryan* is not the perſon that hinders the plaintiff's admittance, both which by ſilence are agreed unto by Mr. *Bryan*; but that the plaintiff hath not taken a right courſe.

2. That the letters patent as to the matter in queſtion are of no concernment: 1. Becauſe they are not reſtrictive, ſo as none other ſhall viſit but the chancellor or vice-chancellor. 2. Becauſe the vice-chancellor muſt be *in ea parte deputat' ſive appunctuat'*, which is not here alledged to be done: So that they make nothing in this caſe, and this being obſerved already, I ſhall ſpeak no more to them.

3. That (contrary to what hath been by the way alledged, but not proved on the other ſide) every eleemoſynary foundation is not viſitable by the ordinary; 'tis ſaid, 8 *Aſſ. pl.* 31. That the ordinary ſhall not viſit but where he hath inſtitution and induction; and with that agrees the opinion of *Keble*, *Hill.* 6 *H.* 7. 14. *pl.* 2. But admit that the ordinary may viſit where he hath not induction, yet his power ſhall not extend to all eleemoſynary foundations; for *Regiſt. Orig.* 35. *a.* A prohibition is to an officer of the court of *Canterbury* and his commiſſary for the holding plea concerning the grammar ſchool of *Fernedon*, in a ſuit between the abbot and convent of *Battel* and *William Pipod*, *Regiſt.* 41. *a.* Another prohibition * to the archdeacon of *Taunton* for holding plea concerning an hoſpital, and yet nothing can be more eleemoſynary than ſchools and hoſpitals. And could the ordinary by the common law have viſited all foundations eleemoſynary, the ſtatute of 2 *H.* 5. *cap.* 1 had been to no purpoſe, which doth enable the ordinary to correct the abuſe of lay-hoſpitals erected for the purpoſes therein mentioned. So that I do conceive, as it is of hoſpitals, ſo of all other eleemoſynary foundations, and without ſpecial viſitors. 8 *Aſſ. pl.* 29. and *Coke l.* 10.

* P. 107.

31.

31. *a.* If the hoſpital be ſpiritual, the biſhop ſhall viſit; if lay, the patron: for ſo the writ in the *Regiſter* before cited is, *fol.* 41. *Totum in temporalibus fundatum exiſtit.* And the ſtatute *De circumſpecte agatis*, 13 *E.* 1. *Epiſcopus teneat placitum in Curia Chriſtianitatis de iis quæ mere ſunt ſpiritualia.* And *Linwood* 53. expounding what are *Merè Spiritualia*, ſays, *Quæ non habent mixturam temporalium.* And if there be no viſitors ſpecially appointed, then in common reaſon, and according to the rule of law, *Ne deficeret Juſtitia*, the king. So that now, whether this college upon the whole record be of a lay or ſpiritual foundation, is the queſtion: for if it be ſpiritual, then I muſt acknowledge the biſhop of *Ely* (admitting the court ſhall intend its being within the compaſs of his dioceſe to be within his juriſdiction) in all things ſpiritual ought to viſit; but if it prove a lay corporation, then I conceive the king is to viſit, for no founder appears, *Ne Curiæ Regis deficerent in Juſtitia exhibenda*, *Co. Inſt.* 4. 213. And I do conceive this college, as it is here deſcribed, to be of a temporal and lay foundation. In the proof whereof I ſhall make no difference between it and other colleges of the univerſities; for if any difference, it will be on my ſide, the foundations of other colleges being more ſpiritual than this.

1. From the end and purpoſe of its foundation, *viz. Ad ſtudendum & orandum.* 1. *Ad ſtudendum*, which may be, and by experience we ſee hath always been humane learning principally, *viz.* logick, philoſophy, mathematicks, *&c.* And the conſtant practice founded upon the opinions of learned men concomitant with practice. *Camden* in his *Britannia* 381. deſcribing the univerſity of *Oxford*, ſays, That the places of learning were in old time called *Studia*, for that they were deſigned *pro bonarum literarum ſtudioſis*; and in his deſcription of *Cambridge*, having repeated all the colleges in that univerſity, amongſt which he names this of *Queen's*, ſpeaking in commendation of this univerſity, *I will*, ſays he, * *let paſs little monaſteries and religious houſes.* So that he makes a plain diſtinction between the colleges in the univerſity and religious houſes. And *Stow* in reckoning up all the colleges of both univerſities and their foundations, *fol.* 450, *&c.* ſhewing ſome originally founded for grammar, others for logick, others for other ſciences, reckons none of them barely for eccleſiaſtical matters. *Linwood* 155. *K. Cap. De Magiſtris*, ſays, A college is only *Habitaculum Scholarium*; and 161. *Cap. De Hæreticis, Verb. Ipſius loci*, where treating of the juriſdiction of the ordinary in puniſhing hereticks, puts this queſtion: What if the place be

Bodin. de Rep. l. 3. c. 7. *de Colleges Review del Comſel de* Trent, l. 5. c. 3. p. 232. Learning and Clergy Synonyma, Seld. diſſertationes ad Flet. c. 9. pag. 541, 542.

* P. 108.

Non habens Eccleſiam Parochialem, qui eſt locus Religioſus, vel Collegium, aliuſve locus qui non ſubeſt Eccleſiæ Parochiali? So that *Collegium* (which I take to be in the univerſity) is a place diſtinct from *Locus Religioſus*. And in truth, if we obſerve the foundation of all religious and eccleſiaſtical corporations and ſocieties, not one was ever ſeen whoſe end was *Ad ſtudendum*. Their deſign was either to pray *pro animabus*, or to obſerve ſuch and ſuch canonical hours, according to ſuch and ſuch an order, their mattins, veſpers, compline and other divine offices tending to divine worſhip, which was already by the church prepared to their hands, and ſuch as men of little or no learning might perform. They might contemplate upon what was already invented and ſtudied, and agreed on to their hands, but not excogitate new matters in religion. They went on in a circle, and where they left off at night, they began the next morning. They were not injoined *Ad ſtudendum*, but *Ad celebrandum divina*. True it is, ſome members of ſuch foundations have been ſtudents, and have profited in arts, and have written learned tracts, but they were not injoined to do ſo; for 'tis not ſtudy, but *Celebratio divinorum* makes an eccleſiaſtical corporation. For ſuppoſe a man ſhould erect a ſociety, and direct that it ſhould be to ſtudy the ſchoolmen or the fathers, to enable them in the polemical parts of theology, or to paraphraſe or make a comment upon the bible, as the *Schola Conimbricenſis* did upon *Ariſtotle*, this would not be a ſpiritual corporation; for that the ſpirituality conſiſts *in celebrando divina & fungendo divinis officiis*, and not *in ſtudendo*. 2. *Ad orandum* is no more than what is implied, for with all ſtudies that muſt be concomitant. A lawyer by the lord *Coke*'s rule of *Quatuor orabis* may be as well an eccleſiaſtical perſon, if *Ad orandum* ſhould make him eccleſiaſtical. I may ſay of this word *Ad orandum*, as *Lindwood* expounds the words * of *Circumſpecte agatis*, *De mortali peccato*. 1. ſays he, *Non intelligas de omni peccato mortali, ſed de tali cujus punitio de ſui naturâ ſpectat ad forum Eccleſiaſticum*; for if the church ſhould take conuſance *de ratione cujuſlibet peccati mortalis periret temporalis gladii juriſdictio*, for that every evil act would have ſomething of mortal ſin in it. So if the injunction of ſaying one's prayers would make a corporation ſpiritual, none almoſt of thoſe, which are out of doubt lay hoſpitals, but in their creation would be ſpiritual. Nay in *Pit*'s and *James*'s caſe, *Hob.* 121. Prayer for ſouls was injoined, and yet the hoſpital was lay. And denomination is from the greater part of the imployment, *viz.* If it be to celebrate in *Eccleſiaſticis*, 'tis that

* P. 109.

that makes an eccleſiaſtical perſon. They were *Divino mancip' ſervitio*, and did *Deo ſervire*. As to the objection, that the fellows are here injoined to be in orders, it hath been anſwered: 1. The preſident is not injoined. 2. They may be diſpenſed with amongſt themſelves.

2. From the uſe. 1. How they are uſed in the commonwealth. 2. What acts they do not compatible with a ſpiritual corporation. To the 1*ſt*, 8 *Aſſ. pl.* 29. A ſpiritual corporation is not chargeable with ſubſidies, nor taxed amongſt the laity. Now a college in the univerſity is ſo taxed in every act for ſubſidy, as we may ſee 21 *Jac.* 3 *Car.* 1. and the laſt act for ſubſidies, 15 *Car.* 2. only there is a proviſo to diſpenſe with their payment. 2. The univerſity ſends burgeſſes to the parliament, which they could not do if they were a ſpiritual corporation, *Et eadem eſt ratio partis & totius*, if the whole be lay, the eſſential parts cannot be ſpiritual.

Roy poet create Doctors in Divinity. Seld. tit. Hon. l. 2. c. 1. pag. 394. Count Palatine poet ſigat fair.

3. From their conſtant application to the temporal power upon all occaſions of grievances amongſt them, and the balking the biſhop of the dioceſe. *Linwood fol.* 155. *cap. De Magiſtris.* When books of *Wickcliff* were ſpread abroad, and others pretended to expound the ſcriptures, a canon was made, that none ſhould do ſo, but by licence from twelve of either of the univerſities, to be allowed by the archbiſhop of *Canterbury*, not the biſhop of *Ely*, or of the dioceſe. 5 *E.* 2. *M.* 8. *Riley* 533. One *Roger Baketon* having a deſire to take his degree in the univerſity, was denied, and thereupon he brought his *Mandamus* directed to the chancellor and maſters of the univerſity. *Teſte Rege* 28 *die Martii al York.* *Riley* 534. In the ſame year the univerſity thought themſelves ſo far from being a ſpiritual corporation,* that they excluded certain ſcholars who were of the order of the predicants, and denied them any privilege of the univerſity, and thereupon theſe ſcholars (waiving the biſhop of the dioceſe) apply themſelves to the king, and obtain a *Mandamus* directed to the chancellor, *Regentibus & non Regentibus* of the univerſity, commanding them to allow the complainants the privileges by them challenged. *Teſte Rege*, 29 *Martii* 6 *E.* 1. *Co.* 2 *Inſt.* 640. *Rex non intromittit ſe de his quæ ſpectant ad forum Eccleſiaſticum, proſequatur coram Ordinario jus ſuum.* *Riley* 601 *Clauſ.* 19 *R.* 2. *M.* 24. *Robert Lichlade*, a ſcholar in *Oxford* for maintaining lolardy was complained of, and the univerſity was remiſs in puniſhing him; the biſhop takes not upon him juriſdiction though in a cauſe of hereſy, but the king directs his writ to the chancellor of the univerſity to remove him:

* P. 110.

Teſte Rege, 18 Julii.

In

In which writ the words are very remarkable, That this *Lichlade* did *publicare, communicare & docere opiniones nefarias, ac concluſiones deteſtabiles in fidei Catholicæ læſionem, & Univerſitatis prædictæ ſubverſionem, niſi brachio Regiæ Majeſtatis* (not the viſitation of the ordinary) *citius reſiſtatur*; and then commands that they ſhall examine *per Inquiſitionem vel alio modo legitimo ſi ipſum talem inveniri contigerit: Per Inquiſitionem* according to the common law, and not by eccleſiaſtical proceſs. 50 *E.* 3. *pars* 2. *membrana* 8. *John Wolverton*'s caſe. A *Mandamus* to reſtore a fellow in *Cambridge*, who was turned out of the univerſity; and *F. Corody* 6. the very ſending the writ ſhewed a right to the juriſdiction till the contrary be ſhewed. 21 *E.* 1. *C. B. Rot.* 318. *March* 181. *Habeas Corpus* for a ſcholar impriſoned by the vice-chancellor, no application to the biſhop which had been proper, if oppreſſed by falſe accuſation for hereſy, *&c.* All which precedents ſhew that the colleges were of temporal conuſance, or at leaſt not ſubject to the viſitation of the ordinary. 5 *Mar.* A commiſſion iſſued to viſit the univerſity of *Cambridge*, amongſt which viſitors were ſome biſhops, *viz. Cheſter* and *Chicheſter*, but the biſhop of *Ely* was none. The letters patent in the return do imply that the biſhop had nothing to do with this matter.

M. 34 H. 6. 14. b. pl. 27. Expreſſe in le point que poet.

I will not repeat the anſwers which have been made to the objections, as 1*ſt*, That an impropriation may be to a college, which 1*ſt*, hath not been reſolved; for none have ſo been. All the impropriations they now have being heretofore impropriated to religious houſes before the diſſolution. 2. It was not reſolved, whether an appropriation may not be to a lay * corporation, there being no judgment in *Alden* and *Tothil*'s caſe. 2. That the act to be done is temporal, and no more than the writ *De admittendo Clerico*, *F. N. B.* 38. and induction is a temporal thing. 8 *Jac. Bulſtr. l.* 1. 179. *Holt*'s caſe. And an action lies againſt the archdeacon for not inducting, *F. N. B.* 47 *H.* 3. 51. *b.* and then *Coke ſur Lit.* 96. *b.* If there be remedy *in foro ſæculari*, then none *in Eccleſiaſtico*. As for Dr. *Lewes*'s caſe it was not reſolved judicially, and if it had, this point was not in queſtion. As for Dr. *Widdrington*'s caſe, I conceive though the concluſion of that caſe do not, yet the reaſon given by the court upon granting the *Mandamus* will make for me; for then the writ was oppoſed with the argument, that there were ſpecial viſitors, the court ruled, that a writ ſhould go, becauſe it appeared not to them till the return, that there were ſuch. So that they took no notice that the biſhop ſhould viſit; who is notorious.

* P. 111.

As

As for precedents, *Hob.* 270. *tantum habent de lege, quantum habent de Juſtitia*, and they are built upon reaſon and juſtice; now though I am not able to produce any other precedents, than what I have before mentioned; yet (as hath been by thoſe who have argued on my ſide already obſerved) there is as much reaſon for this writ (if not much more) as to ſwear a town-clerk, churchwarden, conſtable, mayor or head of ſome corporation; nay for a ſcavenger, to command him to take upon him that office. *Mich.* 1652. The caſe of the inhabitants of *Clerkenwel*, and in *Bagg*'s caſe, and 4 *Inſt.* 71. In any caſe where there is oppreſſion, which I conceive extends to this caſe, it appearing to the court that my client hath right to this place, but held out by a dilatory return. Laſtly, This writ will not conclude the right of either party; but duly elected or not elected will be tried in an aſſize, or other action, as in the caſe of the abbot of *Fountain*, 9 *H.* 6. 32. *b.* And this very argument was prevalent with *Bryan* chief juſtice in 6 *H.* 7. 14. where the caſe was, A free-chapel was annexed by licence to *Magdalen* college in *Oxford*, the maſter avows for rent by the name of maſter of the college and *Cuſtos Capellæ*; and it was objected, that whereas it was ſet forth, that the union was by the licence of the ordinary, it did not appear whether the ordinary had any juriſdiction or no; and no reſolution as to that point: But ruled by *Bryan* that it was all one to the tenant, whether it was a free chapel or viſitable; for the rent was due, and no prejudice could be to the tenant by determining either way. The prejudice was the thing conſidered * by the court. So here no prejudice in granting, but much by not granting; and ſo I pray the writ to ſwear Mr. *Patrick*.

L. 5 E. 4. 112. *Precedents ne rule le ley, mes le ley rule les precedents*, Dyer 105. a. pl. 14.

* P. 112.

Baldwin contra. There are 4 things inquirable in this caſe. 1. Whether this college be a ſpiritual or a temporal foundation. 2. Whether by this return it appears, that there are any ſpecial viſitors for this college. 3. Whether this court may intermeddle with the government of the college. 4. Admitting it may, whether it may do it *per Saltum*, or whether Mr. *Patrick* ought not firſt to have appealed to the biſhop. 1. 'Tis a ſpiritual foundation, the fellows are called clerks, and *(ergo)* their ſtudy is theology, and the ſtatutes of the college are, That they muſt enter into orders, and every college is of a ſpiritual foundation. 1. From the end, for the advancement of learning, 11 *H.* 4. 47. *per Thirning.* A grammar ſchool is ſpiritual. *Seld. Hiſt. de Diſmes*, 121. Hoſpitalers and templers are religious; and yet no part of the clergy. *Linwood de Religioſis*

118. 2. Colleges are governed as other eccleſiaſtical corporations. 8 *Aſſ. pl.* 29, and 31. 3. A thing of an eccleſiaſtical nature may be annexed to a college. 6 *H.* 7. 13. 10 *H.* 7. 19. 11 *H.* 6. 26, and 27. *Co. Lib.* 5. 10. *Caudry*'s caſe. 7 *E.* 3. *Qu. Impedit* 19. *Dyer* 255. *Allen Clerk*'s caſe. 2. It appears there are no viſitors. 3. This court cannot intermeddle. 1. Becauſe a college is a ſpiritual foundation, and hath a proper viſitor. *Spelman*'s *Gloſſ. verb. Viſitator, Trin.* 13 *Car.* 1. *Allen* verſus *Naſh.* Ejectment of the demiſe of *Huntley*. The defendant gave in evidence a deprivation of the leſſor by the high commiſſioners; but reſolved, That if he had been deprived by the ordinary, the court could not have intermeddled. 2. *Ab inconvenienti.* For if a *Mandamus* ſhould lie for putting in a fellow, it would lie for a fellow that is turned out; and ſo it would be a charge to the ſcholars, and it would be againſt the dignity of this court to take notice of every trivial offence ariſing between the ſcholars in the univerſities. 3. This court did never intermeddle in this kind. So *Dyer* 376. Error of a judgment in the cinque-ports.

Object. Dyer 209. *Covenye*'s caſe.

Reſp. That caſe makes for *Bryan* my client.

Object. Hern's caſe, who was a fellow, and had a *Mandamus* to reſtore him, being turned out.

Reſp. The viſitor of that college was then the archbiſhop of *Canterbury*, and that ſee was then vacant, and ſo there was no proper viſitor in being. As to *Crayford*'s caſe, * P. 113. *Reſp.* * *Hobart Rep.* 17. *James*'s caſe. The king is fountain of juſtice and diſtributes it accordingly. 4. Admitting that reſort might be made to this court, yet it ought not to have been *per ſaltum.* 5 *E.* 3. *Fitz. Error. Curia adviſare vult.*

The caſe ſolemnly argued by 4 judges, Norton and Keiling for the *Mandamus*.

Twiſden and Wyndham *cont.*

The King *againſt* The City of Canterbury.

Privilege. 1 Lev. 159.

AN information was exhibited againſt *John Percival, Thomas Godfry* and *Walter Wilford*, Eſq; for a riot and aſſault by them made upon one *Baker*, a meſſenger of the king, at the three Kings Inn in *Canterbury*. To which the defendants pleaded Not guilty, and a *Venire facias* iſſued to the ſheriff of the city of *Canterbury* (which is a county of it ſelf) and the ſheriff returned a *Venire feci duodecim, &c.* Then there went out a *Diſtringas*, and upon

upon that the ſheriff returns, That the city of *Canterbury* is an ancient corporation, *&c.* known by ſuch name; and that by letters patent bearing date the ſixth of his reign, king *James* granted to the ſaid city, *&c.* that they ſhould not be compelled to go out of the ſaid city upon any cauſe whatſoever, *&c.* the ſufficiency of which return was very much queſtioned by the court.

Hardres counſel for the ſheriff, to make it good, argued, That the grant of exemption is good in point of creation, for which he cited 18 *H.* 8. 5. 42 *Aſſ. pl.* 5. 39 *E.* 3. 15. But the queſtion *(he ſaid)* would be, Whether the words are ſufficient in the king's caſe; and he conceived they were, becauſe they are, that the citizens, *&c.* ſhall not be compelled to appear before the king, or any judge in any jury, aſſiſe, recognition, *&c.* (excepting high treaſon,) and the occaſion of the granting this patent he hoped would make it apparent, that it was the king's intention they ſhould be exempted; for 23 *H.* 6. Exemption was granted to the citizens, and yet they went out of the city to aſſiſes, notwithſtanding the firſt charter was confirmed 1 *E.* 4. But 4 *Jac.* a queſtion aroſe upon a clauſe of this charter, when one *Robert Lad* was indicted for murder, and it was referred to the lord chief juſtice *Hobart* and the attorney general, and they certified that the charter was not ſufficient, becauſe the *B. R.* was not compriſed in it, according to 8 *H.* 6. 21. 21 *E.* 3. 64. 11 *Co. Rep.* 64. Dr. *Foſter's* caſe *coram Rege*; then comes this charter of 6 *Jac.* and if this does not aid in caſes where the king is concerned, the patent will ſerve for nothing, for the * precedent charters have all the other clauſes included in them. He confeſſed exemption did not extend to the king, unleſs he be named, and the words *licet tangat nos.* 42 *Aſſ. pl.* 5. 8 *H.* 6. 21. 39 *E.* 3. 15. But here the words are equivalent, and that is well enough. 8 *H.* 6. 19. Then as to the time of pleading this charter, it comes ſoon enough upon the return of the *Diſtringas*, for it can't come upon the return of the *Venire fac.* becauſe no man is mentioned in it till it is returned. 18 *H.* 8. 5. Citizens ſhall not have advantage of a charter upon an appearance, but upon the return. 27 *H* 6. 5. 34 *H.* 6. 25. 35 *H.* 6. 42. And if the return is naught an action will lie againſt the ſheriff, becauſe he did not obey the writ of allowance, which is alſo returned. 2 *Inſt.* 130. 18 *H.* 8. 5. 22 *E.* 3. 20. Debt againſt a *Grecian*; The defendant prays to be tried *per medietatem linguæ* upon the *Diſtringas*, and it was allowed, becauſe it appeared upon the declaration he was an alien.

* P. 114.

alien. And it differs from the caſe in *Dyer* 357. *Stanf.* 89. becauſe there it did not appear in the declaration that the defendant was an alien, for which reaſon he prayed the return might be allowed. But at another day in *Eaſter-Term* 17 *Car.* 2. the court was of opinion that the return was naught. 1*ſt*, Becauſe the ſheriff having returned upon the *Venire fac.* that there were *probi & legales homines*, and now upon the *Diſtringas* returning, that they ought not to appear, *&c.* contradicts himſelf, and is eſtopped by his firſt return. 2. The ſheriff ought not to claim this privilege, but every ſingular perſon that is deſirous to have the benefit of it. 3. He ought to have averred that there are no inhabitants in the city beſides men of the corporation; for which reaſons the return was quaſhed, and the ſheriff fined a hundred pounds, and an *Alias Diſtringas* was iſſued out.

Term.

Sir *Robert Hide* Chief Juſtice.

Sir *Thomas Twiſden*,
Sir *Wadham Wyndham*,
Sir *John Keeling*,
} Juſtices.

Ward *verſus* Marſh.

Words. 1 Danv. Abr. 95. p. 9. 1 Sid. 241. 1 Keb. 861.

IN an action upon the caſe for ſpeaking theſe words of the plaintiff, *You are a baud, and I will prove you a baud, and you took 5s. for a clean pair of ſheets for two whores and two rogues.* And at another day, *ſhe is a baud, and I will prove her baud, and will have her carted for a baud.* Upon Not guilty pleaded, and found for the plaintiff for all, and intire damages given; it was moved in arreſt of judgment, that the firſt words are not actionable; for it is one thing to call another baud, and another thing to ſay ſhe keeps a bandy-houſe. But by *Kelyng* juſtice, an action lies for calling one *baud*, becauſe a baud is puniſhable in the ſpiritual court by eccleſiaſtical cenſures; but judgment was ſtaid until, &c.

The King *againſt* Middleton.

Error. 1 Keb. 867, 879.

MIDDLETON was indicted at *Guild-Hall* in *London*, and the ſeſſions there were adjourned to the ſeſſions at *Juſtice-Hall*, and there he was tried, and judgment given againſt him for aſſault, battery and wounding of *J. S.* And now he brought his writ of error, and aſſigned for error, that all the adjournments of the ſeſſions are in the preter-tenſe. But by the court 'tis the uſual courſe in indictments, and therefore * well enough, and all the precedents are ſo, and therefore judgment was affirmed. * P. 116.

Williamſon

Williamſon *verſus* Bolton and others.

Cuſtom.
2 Danv. Ab. 312. p. 3.
1 Lev. 162.
1 Sid. 250.
1 Keb. 851, 868, 895.

IN treſpaſs and impriſonment, The defendant juſtifies that *London* is an ancient city, *&c.* and in it there is, and has been time out of mind, a court of orphans which hath governed them, and granted the cuſtody of them; and that there is, and time out of mind has been ſuch a cuſtom, that if any takes away and eloigns an orphan, the court may commit the eloignor to *Newgate* till he diſcovers where the eloignee is, and that one *Amos Pain*, a citizen, died 1 *Jan.* 14 *Car.* 2. leaving iſſue an infant named *Mary* of the age of thirteen years, who was committed by the ſaid court to the defendant *Bolton*, *&c.* and that the plaintiff took her away out of the defendant's cuſtody and eloigned her, and that upon this the defendant was ſummoned to the ſaid court, and appeared, and there refuſed to diſcover where the infant was; upon which the court adjudged that he ſhould be impriſoned; and this is the ſame impriſonment. To this plea the plaintiff demurred. And *Williams* for the plaintiff argued, 1. That the cuſtom of it ſelf is naught. 2. That it is not well pleaded. As to the firſt, That the cuſtody of orphans appertains to the mayor and aldermen, and that they may commit without ſummons. By *Bagg*'s caſe there ought to be notice and ſummons to the party. 2 *Inſt.* 46. 2. There is no lawful trial for the party to acquit himſelf, but only the diſcretion of the mayor and aldermen, confeſſion of the party and examination of witneſſes. 3. The duration of the impriſonment, becauſe the party may be innocent; and the words, *till he be diſcharged by due courſe of law*, do not aid him, becauſe there is no remedy by *Habeas Corpus* nor by appeal. 4. The extent of the cuſtom is to all manner of perſons, and ſo may extend to peers, and others not citizens; beſides the party has an ordinary remedy, *viz. Raviſhment de Gard. F. N.* 142. *g.*

Object. The cuſtom is confirmed by act of parliament.

Reſp. That is of no value, if the cuſtom is unreaſonable. 2 *Inſt.* 142. *Dyer* 245. *b.* 22 *Car.* 1. *B. R. Eſtwick*'s caſe. As to the ſecond, the cuſtom is not well pleaded. They ought to ſhew how this appears that he is guilty, *Specot*'s caſe. 3. This caſe is out of the cuſtom, becauſe it appears that * *Mary Pain* was not married at the time of the commitment. 4. The cuſtom is to have all her eſtate, though it be in any part of the realm, and out of the liberty of the city.

* P. 117.

Fitz. Gard. 166.

Wild

Wild recorder *contra*, for the defendant. 1. This crime of eloignment of a child is in the nature of a theft, and he called it a plagiary. As to the 2*d*, It is in vain to plead ſummons for him that is preſent in court. As to the 3*d*, There is a difference betwixt a plea and a return, for a plea ſhall be taken according to common intendment. As to the 4th, This is a court of record, and a court of the city of *London*, and grounded upon the cuſtom of *London*. *Hutt*. 30. *Andrew*'s caſe, *Hob*. 247. *Luck*'s caſe.

As to the 1*ſt Objection*, Here is a conviction without trial.

Reſp. The court hath no other courſe by cuſtom than examination, which ſhall be intended legal examination.

As to the 2*d Objection*, Duration of impriſonment, that is grounded upon the reaſon of the common law, as in a *Homine replegiando*, *Reg*. 79.

As to the 4*th Objection*, *(viz)* The extent of this cuſtom to peers.

Reſp. 1. Perſon ſhall be intended ſuch which ſhall be ſubject to impriſonment. 2. Peers are not exempt from contempts. 11 *H*. 4. 15.

As to the 5*th Objection*, That there is an ordinary remedy, *F. N. B*. 142.

Reſp. This is only for damages, but here it is for the perſon it ſelf.

As to the 6*th Objection*, He ought to have ſhewn how this appears.

Reſp. This appears upon examination, and the offence appears, *(viz.)* The taking away the orphan.

As to the 7*th Objection*, That the caſe is not made according to the cuſtom, becauſe it does not appear that *Mary Pain* was unmarried.

Reſp. Conſider the time in the plea, *(viz.)* 1 *Jan*. 14 *Car*. 2. *Amos* the father died leaving *Mary* within the age of fourteen, and the twenty-ſeventh of the ſame month the cuſtody was committed to the defendant, and the twenty-ninth of the ſame month ſhe was eloigned, and ſhe ſhall not be intended to be married without making it appear; and the plaintiff ought to have ſhewn this; and the whole court was for the defendant; and judgment was given accordingly for the defendant.

* P. 118.

* Amcots *verſus* Amcots.

Infant.
2 Danv. Abr. 773. p. 3.
1 Lev. 163.
1 Sid. 252.
1 Keb. 896, 900, 934.

ERROR upon a judgment in *C. B.* in a *Formedon* in remainder. The plaintiff counts of a feoffment, 38 *H.* 8. by *Alexander Amcots*, and makes title to himſelf; the tenant being an infant, by guardian pleads, That *John Amcots* was ſeiſed in fee, and prays that the parol may demur; the guardian dies, the demandant counter-pleads the age, and traverſes the ſeiſin in fee and diſcent; and upon this was a ſpecial verdict; and judgment for the demandant; the tenant brings a writ of error, and aſſigns for error in the manner of the judgment, *(viz.)* That it is final where it ought not to be ſo.

Newdigate ſerjeant for the plaintiff. In the writ of error the judgment ought not to be final, but only a *reſpondes ouſter*.

Here are four things to be premiſed. 1. That it is all one in a ſpecial verdict as in a general verdict. 2. The nature of the plea is conſiderable. 3. The infant had no diſadvantage. 4. There is a difference when there is a demurrer upon ſuch plea, and when a ſpecial verdict, and when a demurrer is in the ſame term, and when in another term. 1. In reſpect of the nature of dilatories in general, 1 *Inſt.* 134. In all pleas by the tenant, in diſability, the law giveth liberty to pray in aid and voucher. 9 *Co.* 84. *Gonje*'s caſe. In a *Ceſſavit* againſt an infant, the parol ſhall demur. 2 *Inſt.* 291. Infancy is preferred before dower. *Cro. Jac.* 398.

Object. Here is a verdict.

Reſp: It is the ſame as if verdict, and no difference in reaſon; for the plaintiff might have demurred, and a demurrer is more tedious than a verdict. 2. When it is an iſſue upon a collateral point, the judgment ſhall not be final, but a *Reſpondes ouſter*. Appeal 18 *E.* 3. *Fitz. Outlawry* 47. *Bro. Peremptory.* 28 *Aſſiſe, pl.* 52. 6 *Aſſiſe, pl.* 1. 40 *Aſſiſe, pl.* 2. *L.* 5 *E.* 4. 90. *Bro. Peremptory* 44. *Fitzh. Iſſue* 24. *Bro. Peremptory* 69. 1 *Inſt.* 135. *Co. Entries* 321.

Object. Delay.

Reſp. We muſt diſtinguiſh between delays, for dilatories are allowed in real actions. If it be a delay that an infant ſhall not be prejudiced but with a contempt, it ſhall be one. *Cro. Eliz.* 467. *Holford* verſus *Plat*, 8 *H.* 7. 8. It is error to deny a dilatory; this plea is not found to be falſe, *(viz.)* minority.

Object.

* *Object.* 24 *E.* 3. 76. *Bro. Peremptory* 22. by *Wilby*, 25 *E.* 3. 80. *pl.* 2. * P. 119.

Reſp. The reaſon of that caſe is, If he had been of full age it ſhould be peremptory; but here the plea is not falſe.

Object. If a demurrer in another term. *Fitz. Voucher* 17 and 119.

Reſp. It is the ſame reaſon, for none ſhall be prejudiced by the act of court; as adjournment, continuance, *&c.* Voucher is in ſtead of a plea in bar; it is not a delay with contempt no more than 8 *H.* 7. 5. *Plow.* 364. *Fitz. Aſſiſe*, 43. The delay is by the demandant himſelf, for he imparled four terms.

Object. Latch 177. *Cademan*'s caſe.

Reſp. The concluſion was not good; the demandant himſelf prayed only that the tenant ſhall be ouſted of his age, and therefore no other judgment ſhall be given in a plea after *Darrein Continuance. Yel.* 18. *Hawkin*'s caſe.

Jones for the defendant. As to the prayer of the demandant, it is ſo in all pleas to the writ, *quod breve caſſetur*. It is a general rule *L.* 5 *E.* 4. 90. *b.* in every action, if iſſue be joined and found, it is peremptory for the tenant or defendant; and no difference betwixt an infant and another, if the books and authorities do not contradict this. In the caſe of a counterplea of a voucher, this is not in nature of a plea in bar, becauſe it is not peremptory after demurrer, before the ſtatute of *Weſtm.* 2. *cap.* 6. *Excommunication*, 3 *H.* 4. 3. 50 *E.* 3. 20. But theſe differences are to be obſerved, 1. In every dilatory plea, after iſſue againſt the tenant, it is peremptory. 2. Upon dilatory demurrer it is not peremptory in one caſe, *(viz.)* after the *Darrein Continuance*, *L.* 5 *E.* 4. 139. 2 *E.* 4. 10. *Yelv.* 112. *Fitz. Iſſue* 14 and *Age* 122. by inſpection it is not peremptory, becauſe by the judges. The reaſon is. 1. Upon a verdict the delay is greater. 2. The matter of fact lies more in the intelligence of the plaintiff.

Twiſden juſtice. This is a ground, If a dilatory be pleaded and found againſt him, it is peremptory. *Adjournatur.*

Pritchard's

* P. 120.

* Pritchard's *Caſe*.

Parliament. 1 Lev. 165. 1 Sid. 245. 1 Keb. 871, 884, 887. 850, 525.

THE Houſe of Lords in parliament made an order for the apprehending of *Pritchard* to commit him to priſon. Before the order executed the parliament was prorogued. The ſerjeant at arms five days after the prorogation of the parliament arreſted the ſaid *Pritchard*, and had him in cuſtody, and now he brings his *Habeas Corpus*.

Coleman for the defendant. 1. The return here is inſufficient, becauſe it is not ſhewn that he was committed by virtue of an order of the Houſe of Lords. 2. Becauſe the commitment is not lawful, for every prorogation is *quaſi* a new parliament. 3. He is committed for not payment of fees; and it doth not appear what.

Kelyng juſtice. If a man be committed by parliament which is prorogued, the court may bail him. Here the return is not ſufficient, becauſe no day is mentioned when the warrant came to the ſerjeant at arms, and therefore the party ought to be diſcharged.

Wyndham juſtice to the ſame intent, becauſe it ſhall be preſumed that the party was taken after the parliament prorogued. *Bro. Parliament* 86. Every ſeſſions is a new parliament. 1 *H.* 7. 20. *Flowerdew*'s caſe. Judgment given in parliament may be executed by the chancellor *quia tranſit in rem judicatam*.

Twiſden juſtice accordingly: Be the perſon taken before or after the parliament prorogued he is to be diſcharged.

Hide chief juſtice of the ſame opinion. 22 *E.* 3. 23. A writ came to the chief juſtice of this court to remove a record. By the court he was diſcharged.

Whaley *verſus* Anderſon.

Mich. 14 Car. 2. Rot. 399.

Treaſon. 1 Sid. 260. 1 Keb. 329, 874, 905, 909, 933.

IN ejectment of a demiſe from *Springate* and *Stapley*. On Not guilty pleaded, the jury found a ſpecial verdict, That *William* marqueſs of *New-caſtle* being ſeiſed in fee the 19*th* of *May* 16 *Car.* 1. demiſed to *More*, *Wolrich* and *Aleſtry* for ninety-nine years, upon condition to pay 2500*l.* in the

* P. 121. year * 1700, and 200*l. per annum* in the mean time; *More* dies, and then *Wolrich* and *Aleſtry* 12 *Febr.* 17 *Car.* 1. aſſign to *Warren* and *Lanyon*. *Edward Whaley* purchaſes the reverſion. *Warren* and *Lanyon* 1 *November* 1656. aſſign

aſſign to Sir *Charles Harbord*, and agree, that if *Whaley* pay half a year's intereſt and principal upon the *17th of Novemb.* then the aſſignee ſhall be in truſt for him. *Edward Whaley* doth not pay the principal in 1658. by indenture betwixt *Springate*, &c. for the uſe of his daughter upon marriage with *John Whaley*. *Harbord* aſſigns to *Springate* in truſt by the direction of *Edward Whaley* to permit *John Whaley* to take the profits of 200*l. per annum*, the remainder to the wife for life, and the reſidue for the charges of the truſtees, and after to *Edward Whaley*. The 2500*l.* was paid by *Springate* to Sir *Charles Harbord*; the marriage took effect; the laſt indenture was not in truſt for *Edward Whaley*. The 25*th* of *April* 12 *Car.* 2. by the act of attainder *Edward Whaley* was attainted, and all manors, &c. of which he was ſeiſed were forfeit; and upon the whole matter, If for the plaintiff, &c. and the main queſtion was, If this truſt ſhall be forfeit to the king by the act of attainder.

Jones for the plaintiff. The king hath no title in law to theſe lands. 1. What right or intereſt *Edward Whaley* had by theſe indentures. 2. What may accrue by this forfeiture. As to the 1*ſt*, There are three indentures, and ſo many pretences. 1. A reverſion upon payment of 2500*l.* 2. *Edward Whaley* had a contingent truſt by the ſecond indenture. 3. The reſidue of the profits was to him. 1. He cannot have a right by the redemption, becauſe the king ſhall not be in a better plight than *Whaley* himſelf. As to the 2*d*, touching the intereſt upon the contingent, This is paſſed, and depends upon an act to be done, which was not done, *(viz.)* payment upon *November* following. The third upon the third indenture. If by this limitation of the reſidue of the profits, the king hath a title to the land? And he conceived not. 1*ſt*, The verdict finds that the truſt was to *John Whaley* for 200*l.* a year, and to the truſtees for their expences, and then to *Edward Whaley*. The jury doth not find that any reſidue remains, nor that the land is of any value, and then no ſurplus ſhall be intended. To the 2*d*, If the intereſt of the king ſhall ſwallow the whole land? And he conceived not. 1. I agree, that in caſe of forfeiture upon attainder the king is intitled to perſonal things intirely; as in the caſe of an obligation, a horſe, &c. the attainder * of one jointenant ſhall forfeit all, but not of things in poſſeſſion, which may be divided. 3 *Inſt.* 55. Chattel real in poſſeſſion; and *Plow.* 243. intimates ſo much, becauſe he inſtances only in intire chattels.

* P. 122.

Object. Dame *Hale's* caſe, Leaſe for years forfeit by a jointenant.

Reſp. The pleadings of this caſe ſhew the caſe to be of a leaſe aſſigned to baron and feme after marriage, and ſo no moieties betwixt them. 2. The reaſon of this caſe is the relation from the time of the forfeiture, which is there a diſpoſition; but in caſe of jointenancy the one may grant only a moiety; but in our caſe there is no jointure, and they cannot take the profits together; but there is a priority of time between them, they may be tenants in common by perception of the profits. The words of the act of parliament are, *All lands*, &c. *of which* Edward Whaley *had any eſtate, or any in truſt for him, ſhall be veſted in the king*, &c. But there is alſo a ſaving to all ſtrangers; the king ſhall have the ſame eſtate in law as the party had in equity, and not more; and therefore if the truſt had been for *John* for life, the remainder to *Edward*, the king ſhall have only the remainder, and not the poſſeſſion. Here *Edward* can never have the poſſeſſion of the land. If *Edward* had brought his *Subpœna*, he ſhould never have the poſſeſſion, for there are precedent eſtates; but the truſtees ſhall deliver the ſurplus to *Edward*. It is like to the ſtatute of uſes, for this ſtatute of attainder executes truſts. If the truſt had been, that the truſtees ſhall permit the *Ceſtuy que Truſt* to perceive and take ſuch annual ſum, it ſhall be veſted in the king.

Bigland for the defendant. Conſider the caſe, 1. Without reference to the deed of ſettlement, and then the caſe is, 1. When *Edward Whaley* purchaſes the reverſion he hath a right of redemption. 2. When the mortgagee and the reverſioner join in an aſſignment; although the money was not paid at the day, yet the truſt remains. Where an eſtate is once veſted in the king, nothing ſhall deveſt it. 1 *Inſt.* 118. *Cro. Jac.* 82. —— verſus *Wyndham. Moor* 196, 815. *Palmer's* caſe. If the truſt had been, that *Edward Whaley* ſhall have all the profits, then the term it ſelf ſhall be in the king, *Adam* and *Lambert's* caſe; The king ſhall have all becauſe a mixt intereſt. *Plow.* 423. Here the king hath ſomething, and if it do not appear what part he ſhall have, he ſhall have all.

Wyndham juſtice. A leaſe upon condition to pay at a day to come, and then the leſſor makes another leaſe by eſtoppel, * and then procures another to pay the money; the leaſe by eſtoppel ſhall take place.

* P. 123.

Kelyng juſtice for the plaintiff.

Twiſden juſtice. The queſtion is, If the equity of the truſt

truſt be forfeit, and it ſeems not; and it was adjourned; and after judgment was given for the plaintiff.

Willan *verſus* Gill.

GEORGE ALLINGTON makes his will, and *Gilham* and *Denhurſt* his executors; *Denhurſt* makes his will, and executors, and dies; *Gilham* dies inteſtate, his adminiſtrator ſues the executor of *Denhurſt* for a legacy due from *Allington*. *Simpſon* moved for a prohibition. Prohibition.

Twiſden juſtice. Here by the ſpiritual law the plaintiff may ſue the executor of *Denhurſt* as executor *de ſon tort*.

Kelyng juſtice. The executor of *Denhurſt* may be ſued as executor of his own wrong, but then he cannot be ſued as executor of *Denhurſt*, but as executor of *Allington*.

Twiſden juſtice. In our law it is ſo; but in the eccleſiaſtical law perhaps it is otherwiſe.

Wyndham juſtice accords with *Twiſden*, it is more proper for an appeal than a prohibition.

Twiſden accords, and a prohibition denied by three againſt *Kelyng*.

Buck *verſus* Angel.

THE plaintiff counts, that whereas he had procured one *Woodward* at the requeſt of the defendant to ſurrender a leaſe, the defendant would pay, &c. On *Non Aſſumpſit* pleaded, and verdict for the plaintiff, it was moved in arreſt of judgment, becauſe it is not ſaid that the defendant aſſumed and promiſed. And to *Twiſden* juſtice it ſeemed not to be a good declaration, and ſo it was ruled in the firſt caſe that he ever moved in this court. But it ſeemed to *Kelyng* juſtice to be only matter of form. But judgment was ſtayed until, &c. Aſſumpſit. 1 Danv. Abr. 74. p. 1. 1 Lev. 164. 1 Sid. 246. 1 Keb. 872.

* Burton *verſus* Robinſon. * P. 124.

DETINUE for a deed, and verdict for the plaintiff, that the defendant detained the deed, and 20*l.* damages; and then iſſued out a *Diſtringas* to deliver the deed or the value, and after that a writ of inquiry iſſued for the value, and found a different value from the firſt verdict; and it was moved that the laſt damages found on the writ of inquiry ſhall ſtand. *Raſt. Entr.* 214, 219. *tit. Judgment in* Inquiry. 1 1 Sid. 246. 1 Keb. 892.

Detinue c. 3. And *Chenye*'s caſe here doth not oppoſe this, becauſe here attaint doth not lie.

Kelyng juſtice. There cannot be damages and a writ of inquiry alſo.

Twiſden juſtice. There ought to be both; and it was adjourned, and after adjudged for the plaintiff.

Errington *verſus* Hirſt.

Intr. Trin. 16 Car. 2. Rot. 505.

Debt.

DEBT upon an obligation againſt an executor. The defendant pleads *Non eſt factum*; and upon this the jury found a ſpecial verdict, *viz.* That the teſtator of the defendant ſealed and delivered the obligation, and that the plaintiff was a commiſſion officer, and detained the ſaid teſtator in priſon until he had entered into this obligation. And they found the act of oblivion that pardons all acts of hoſtility, and all appeals and perſonal actions by reaſon of them ſhall be diſcharged, and that all perſons may plead the general iſſue, that the defendant nor teſtator are not excepted.

1 Keb. 883.

Turnor for the plaintiff. There are two points. 1. If this obligation be nulled by this act; and it ſeems that it is not. 2. If the defendant may plead *Non eſt factum?* And it ſeems he cannot.

To the 1*ſt*, It is not within the words of the act, becauſe there is no mention of an obligation given to another.

2. It is not within the meaning, becauſe it is not a crime or offence. *Plowd.* 173. *Hill* verſus *Grange*. Words ought to anſwer the ſenſe of a ſtatute; the act was intended for the benefit of the plaintiff, who was a commiſſion officer.

* P. 125.

* *Object.* Or relating thereunto.

Reſp. This obligation is collateral to the offence, and not relating; for relating ought to be preceding and not ſubſequent, and therefore it was adjudged, *Dyer* 14 *b. Tunc* is extended until; 164 and 286. 5 *Co. Clayton*'s caſe, 2 *Inſt.* 112. A ſtatute ought to be expounded to prevent prejudice to a third perſon.

As to the 2*d*, He cannot plead *Non eſt factum*, but the ſpecial matter, and conclude *Iſſint nient ſon fait.* 1 *H.* 7. 15. 5 *Co.* 119. *Whelpdale*'s caſe, *Hob.* 72.

Linley for the defendant. As to the 1*ſt*, It is within the words of the act in a legal ſenſe. Perſonal actions include the

the cauſes of action. 1. *Inſt.* 285. 8 *Co.* 153. *Littleton ſect.* 512. it extends to obligations. There is another clauſe, *viz. That all differences betwixt the ſubjects*, &c. and all that had followed upon it. Here this act of hoſtility which occaſioned the obligation. 2. This is within the intent, which was to take away all thoſe things which might be the cauſe of future diſturbance.

As to the 2*d*, If the act had ſaid that the obligation ſhall be diſcharged, then it ought to be pleaded; but here it is that the obligation ſhall be void, and that the defendant may plead the general iſſue.

Kelyng juſtice. The act enures between man and man, as a releaſe; that the impriſonment is diſcharged is clear, then it ſeems the obligation ſhall be diſcharged.

As to the 2*d*, The general iſſue aids where the defendant cannot juſtify at common law; here may be a juſtification at common law.

Wyndham juſtice. A contract ſeems not to be diſcharged by this act, although many of them were forced by acts of hoſtility. A man takes a horſe in thoſe times, treſpaſs doth not lie, but upon demand trover lies.

Twiſden. Acts of hoſtility ſhall be intended matters of force.

As to the 2*d* point, The act gives a latitude to the party. And it was adjourned.

* Merrel *verſus* Rumſey. * P. 126.

Intr. Hill. 14 Car. 2. Rot. 689.

EJECTMENT for land in in the county of *Monmouth*. Upon Not guilty the jury found a ſpecial verdict, *viz.* That *Edmund Williams* ſeiſed in fee 20 *Aug.* 15 *Car.* 1. by indenture covenanted in conſideration of marriage, and 600*l.* portion to levy a fine to the uſe of the conuſees till a recovery had, and then the recoverors ſhould be ſeiſed to the uſe of *Edmund* and *Dorothy* for their joint lives, the remainder to the heirs of the body of *Dorothy* by *Edmund* ingendered, remainder (*Dorothy* ſurviving *Edmund*) to *Dorothy* for life, remainder to the right heirs of *Edmund*; the marriage takes effect, a fine is levied, but no recovery was had; and there is a clauſe in the deed, That if there was not any recovery, that then the conuſees ſhould ſtand ſeiſed to the uſes before mentioned. *Edmund* and *Dorothy* have iſſue two daughters, *Rachel* and *Elizabeth*; *Edmund* dies,

Remainder. 1 Sid. 247. 1 Keb. 888.

dies, his widow marries *William Watſon*, the daughters are leſſors of the plaintiff.

Winnington for the plaintiff. The deſign of this conveyance was, that if the huſband died before his wife, that his iſſue ſhould have it; here *Dorothy* hath no title, but the daughters.

1. When the freehold determines.

2. If it determines upon the death of

3. If the contingent remainder fail, if the other takes.

As to the 1*ſt*, This freehold upon which all the remainders depend, determines upon the death of the huſband, becauſe it is for their joint lives; although a joint eſtate to two ſhall be intended to the ſurvivor, 5 *Co.* 9. *Brudnel*'s caſe; but if a particular limitation be, it is otherwiſe.

To the 2*d*, Remainder to the heirs of the feme ingendered by the baron, theſe are words of purchaſe and not of limitation, and then contingent, ſo they cannot take, as 1 *Inſt.* 22. *b.* Where the anceſtor takes an eſtate for life, the remainder over to him and his heirs, it ſhall be by limitation and not by purchaſe. There is a difference where the freehold is abſolute and intire determinable upon life, and not upon a determinable eſtate for life, where by poſſibility
* P. 127. it may * continue and conſolidate. An eſtate to *A.* for life, the remainder to *B.* for life, remainder to the right heirs of *A.* they are words of limitation. But not when a determinable freehold, as an eſtate during widowhood, remainder to his right heirs; here they are words of purchaſe. 10 *Co.* 85. *Lovie*'s caſe. Lands given to *A.* for life, remainder to *B.* for life, remainder after the death of *A.* to *B.* and his heirs.

To the 3*d*, Then the contingent remainder is deſtroyed. 3 *Co.* 20. *Boraſton*'s caſe.

Powis for the defendant. Here is an eſtate-tail executed in the wife; it had been clear if the wife had died firſt.

2. If the eſtate be limited to *A.* for life, the remainder to the heirs of his body, it is an eſtate-tail executed, 1 *Co.* 204. and there is no difference in this caſe.

1. It is within the words of *Shellie*'s caſe, 1 *Co.* 104. becauſe an eſtate limited to one for life is a freehold indefinitely. 21 *H.* 6. 54. *a.* 33 *H.* 6. 5. *b.* 40 *E.* 3. 20. & 21. It behoveth not that the freehold continue; and *Lovie*'s caſe cited on the contrary part is not to the purpoſe; the caſe in point is in *Perkins ſect.* 337.

2. The wife hath a freehold for life. And it is like the caſe where land is given to baron and feme, and to the heirs of the body of the feme, and ſhe dies. *Dyer* 99. *Fitzh. Br.* 81.

Kelyng

Kelyng juſtice for the defendant. This eſtate is an eſtate-tail executed *ſub modo*, *(viz.)* not as to diviſion of the jointure; but it is to other purpoſes; and ſo all the other juſtices held, and judgment was given for the defendant.

Hunt *verſus* Swain.

THE plaintiff declares that the father of the defendant was obliged to the plaintiff in an obligation, and that the defendant is his ſon and heir; and that the plaintiff notified to the defendant, that he intended to ſue him; and upon this the defendant, in conſideration that the plaintiff would forbear the defendant, promiſed to pay the money due upon the obligation. The defendant pleads *Non Aſſumpſit*, and found for the plaintiff. And it was moved in arreſt of judgment, that it is not ſaid that the heir was obliged in the ſaid obligation with his father.

Aſſumpſit. 1 Dahv. Abr. 57. p. 57. 1 Lev. 165. 1 Sid. 247. 1 Keb. 890, 900. 2 Keb. 62.

* P. 128. Trin. 1656. B. R. *St. Paul* and his wife againſt the Earl of *Rivers*.

* *Wild* ſerjeant for the plaintiff. That it ſhall be ſo intended; and he cited the caſe of ſeignior *St. Paul* and his wife againſt the earl of *Rivers*.

The plaintiffs declare, That whereas the father of the defendant obliged himſelf to the plaintiff's wife, *dum ſola fuit*, in the ſum of 400*l.* for the payment of 200*l.* which father is now dead, and the defendant is his ſon and heir, to whom the plaintiff repaired, and intimated that he intended to ſue the defendant as ſon and heir for the ſaid debt; the defendant upon conſideration of forbearance aſſumed to pay, *&c.* And upon *Non Aſſumpſit* pleaded, and a verdict for the plaintiff, ſerjeant *Twiſden* moved in arreſt of judgment, becauſe it is not ſaid, that the father obliged him and his heirs, and therefore it does not appear the defendant was liable to an action, and ſo the conſideration is void. But adjudged that it ſhould be intended, it being found by the jury, according to *Bidwel* and *Catton*'s caſe. *Hob.* 216. and the plaintiff had judgment upon my own argument; but otherwiſe adjudged between *Barber* and *Fox*. Trin. 22 Car. 2. B. R.

Twiſden juſtice. By this way preſumption ſhall aid any thing; but I confeſs that *Rolls*, when he was chief juſtice, was of the opinion, that it was good in this caſe after verdict; but I conceive the material thing is omitted.

Wyndham juſtice. The defendant hath admitted himſelf to be bound, by the deſire to give time to pay, and therefore it ſhall be preſumed that he was bound, and ſo the plaintiff ſhall have judgment.

Kelyng juſtice. The forbearance only will not maintain the action; for in the action againſt an executor he ought to ſhew that he is executor, but here it is laid that he is heir; as if I lay a man to be executor, although he hath no aſſets, it is good.

Hide chief juſtice. There is a grand difference between an heir and executor; and it was adjourned. *Vid. Hob.*

Hob. 18. *Woollaſton* verſus *Web*, 1 *Leon.* 114. *Grey's* caſe cited in *Stone* and *Withypool's* caſe. 2 *Cro.* 602. *Bard* verſus *Bard*, *contra Yelv.* 56. *Fiſh* verſus *Richardſon.*

Rogers *verſus* Maſcal.

Proceſs. 1 Sid. 248, 259. 1 Keb. 890, 908. 2 Keb. 7, 17.

TRESPASS in aſſault and impriſonment. The defendant pleads that the *26th* of *Feb.* in the Palace court one levies a plaint againſt the plaintiff, and the defendant as ſerjeant of the ſaid court takes him by virtue of proceſs upon this plaint. The plaintiff demurs.

Offley for the plaintiff. The juſtification is by ſeveral proceſs out of the palace court, and doth not ſay it is by preſcription or letters patent.

2. It is ſaid that *Cage* levied a plaint in the nature of an action upon the caſe, and upon this a *Capias* iſſued, and the
* P. 129. * officer returned it. The immediate proceſs here is attachment by the goods, where it ought to be a ſummons. 34 *H.* 6. 49. *a.*

3. *Capias* is not a proceſs within an inferior court, becauſe the ſtatute which gives a *Capias* doth not extend to it. *F. N. B.* 92. *G.* 100. *D.* The ſtatute of 19 *H.* 7. *cap.* 9. gives a *Capias* in *B. R.* and *C. B.* but not otherwiſe; and there is a difference where the juriſdiction is general, erroneous or void, proceſs doth not expoſe the officer to falſe impriſonment. 10 *Co.* 76. But otherwiſe it is in an inferior juriſdiction. *Cro. Car.* 394. and 395. *Nicholas* verſus *Walker.*

4. It doth not appear the court had juriſdiction. It is ſaid generally, that the plaint was in nature of an action upon the caſe, and it may be ſuch an action as cannot be brought in an inferior juriſdiction. *Mich.* 17 *Car.* 1. *Bye* verſus *Olive*, *Rot.* 545. or 548.

Pemberton for the defendant. As to the 2*d*, It is a court of record which ought to have ſuch proceſs. 2. Summons doth not lie in an action upon the caſe, but a *Capias* lies in treſpaſs in any caſe, and it is a general entry in all courts; and the caſe of *Dye* and *Olive* is not to the purpoſe. To the 3*d*, Summons is not a proceſs in an action upon the caſe, but a *Pone*, *F. N. B.* 92, and 93.

Object. It is not ſaid, *quod profert hic in Curia* the letters patent by virtue of which the court is held.

Reſp. The defendant is only a bailiff, and cannot have them, upon the reaſon in *Leyfield's* caſe, and *Dyer* 29. Subleſſee ought to ſhew the leaſe, but ſub-collector and under-

ſheriff

ſheriff not. 36 *H.* 6. 14. 22 *H.* 6. 42. An incumbent ſhall not ſhew the title of his patron. 36 *H.* 6. 14.

Object. It is not ſaid of what ſum or place the court had juriſdiction.

Reſp. It is a court of record, and ſo hath conuſance of all ſums; and ſo is the plea of conuſance of pleas, the plaint is not levied of any ſum but generally. As to the place, it is ſaid to be within the juriſdiction, and cannot be traverſed how many miles it extends, but only that it is not within the juriſdiction.

Object. A *Capias* doth not lie within an inferior juriſdiction.

Reſp. 1. Admit this proceſs doth not lie in an inferior court, yet the court having juriſdiction the officer is not to be puniſhed. 10 *Co.* 76. 2. By the equitable interpretation of the ſtatute of 19 *H.* 7. *cap.* 9. it will extend to other courts. As the ſtatute that gives debt againſt the warden of the fleet * extends to the ſheriff. This ſtatute of 19 *H.* 7. doth not give the *Capias* alone, but at the common law where originally there was not ſummons, but a *Pone*, and then a *Capias*. *Capias* is not the proceſs by this ſtatute, but the exigent. 35 *H.* 6. 6. *a. pl.* 9. *Capias infinitè* was before, and not the exigent. Experience ſhews that before the ſtatute a *Capias* iſſued in theſe courts. *Raſt. Entr.* 293. *a.* A *memorandum* made that the proceſs given by this ſtatute is an exigent.

* P. 130.

2 Inſt. 434. *De uxor' abducta cum bonis viri.* If at the common law, it is a *Pone*; if by the ſtatute, attachment.

Twiſden juſtice. This exception has been taken, but it is cured by appearance.

Wyndham juſtice. It ſeems proceſs in an action upon the caſe was a *Capias infinitè*. But after it was adjudged for the defendant by all the judges beſides *Hide* chief juſtice, who was then dead.

Memorandum, The firſt day of this term died Sir *Robert Hide* lord chief juſtice, who was a man expert in the pleas of the crown, but eſpecially in thoſe which concerned a juſtice of peace.

There being then only three Judges, *viz.*

Sir *Thomas Twiſden*,
Sir *Wadham Wyndham*,
Sir *John Kelyng*,
} Juſtices.

Worral *verſus* Brand and other two Executors.

Death. 1 Lev. 165. 1 Sid. 259. 1 Keb. 902, 906, 925.

ASSUMPSIT againſt two executors. After iſſue joined, one of the executors dies, and then the plaintiff ſuggeſts upon the roll that the other was dead, and upon this there is a trial againſt the other.

Eſcape againſt two ſheriffs, and the one dies. Noy 72. Cro. Eliz. 625. Bannion *verſus* Watſon, &c.

And now *Jones* for the defendant moved in arreſt of judgment, and the queſtion was, If the death of the one abate the writ as to both; and it ſeemed to him that it did.

1. In all actions of treſpaſs, which are grounded upon a tort, the death of one ſhall not abate the writ of the other; but if it be founded upon contract, as *Nihil debet* or *Ne unques receiver*, &c. there by the death of one the writ is abated againſt the other. In debt. 4 *E.* 3. 26. *b.* 50 *E.* 3. 7. In accompt. *Fitzh. Br.* 263, 344. Authorities in the caſe it ſelf. *Plowd.* 186. *b.* *Woodward* verſus *Darcy*, 37 *H.* 6. 16. are caſes in point. 10 *H.* 4. 18. In detinue. 2 *H.* 4. 18. *b.*

Pemberton for the plaintiff. There is no reaſon for this difference put by *Jones*; in 50 *E.* 3. 7. there it was, that he was dead before the action brought, and the writ was falſe. 37 *H.* 6. 16. A writ of error was brought, and it was moved for the plaintiff, but it was never argued; there is cited the 14 *E.* 3. but there is no ſuch caſe. As to *Plowd.* nothing was done, and no judgment there given; *Cro. Car.* 426. *Tiffen*'s caſe, an action againſt two and one dies, and no ſuggeſtion before the *Venire Fac.* and yet good. 41 *E.* 3. 3. Account againſt two, and one dies, the other ſhall anſwer over. *Bro. tit. Reſpondes ouſter pl.* 4. No reaſon for one

one more than another, as in outlawry. Here * is no other action or better brief, and the abatement ſhall be a miſchief to the plaintiff, but none to the defendant by the allowance; for the defendant may plead *Plenement adminiſter*, and the promiſe ſurvives. And there is a difference where there are two plaintiffs and where two defendants. Reſolved by the court that the writ is abated; and they relied upon *Woodward* and *Darcy*'s caſe, and 37 *H.* 6. But ſee *Hern*'s precedents 102, 139. to the contrary. * P. 132.

With this Judgment agrees 1 Leon. 44. *Knight*'s Caſe, but Cro. Eliz. 652. *contra*, & 701.

Opey *verſus* Thomaſius.

UPON a ſpecial verdict in an *Ejectione firmæ* of land in *Devon*, the caſe was to this effect. *Rous* ſeiſed of lands in fee, by indenture makes a leaſe to *Thomaſius* for 99 years, if three lives live ſo long. And then ſettles the reverſion upon himſelf in tail, with a power to make leaſes for one, two or three lives, or for 21 years in poſſeſſion; and then he leaſes for 21 years to commence after the firſt leaſe, and then conveys over the reverſion by fine; the firſt leaſe determines; and the queſtion was if the conuſee may avoid this ſecond leaſe, which, as was admitted, was not within the power, becauſe it was not in poſſeſſion.

Eſtate. 3 Danv. Abr. 195. p. 4. 198. p. 9. 1 Lev. 167. 1 Sid. 260. 1 Keb. 778, 910.

Jones for the plaintiff. There are two points. 1. If the ſecond leaſe be purſuant to the power in the firſt indenture. 2. Admitting that it is not, then if the conuſee ſhall avoid this leaſe made by the tenant in tail.

As to the *1ſt*, There be two parts of powers: 1. To make leaſes in poſſeſſion. 2. Leaſes in reverſion. It doth not come within the power to make leaſes in reverſion, becauſe they are tied up to ſpecial particulars for any number of years determinable, *&c.* 6 *Co.* 33.. *Leper* and *Wrath*'s caſe, *Cro. Eliz.* 5.

Object. It is a leaſe in poſſeſſion, becauſe there ſhall not be two leaſes extended by one and the ſame power, and it is *quaſi* a poſſeſſion.

Reſp. 1. Obſerve the intent of the deed. 2. In pleading, poſſeſſion may be of a reverſion, but not in a conveyance; for there it ought to be according to ordinary parlance, and the ſubject matter guides the thing. *Cro. Jac.* 318. *Hawkin*'s caſe.

As to the *2d*, Tenant in tail of a reverſion makes a ſecond leaſe after the expiration of the firſt, and then levies a fine to a ſtranger, if the conuſee ſhall avoid the ſecond * leaſe; and it ſeemed to him he ſhould. 1. If this ſecond leaſe * P. 133.

leaſe be void or voidable; and he held it was void. 2. If the conuſee may avoid it.

As to the 1ſt, It is void, *Weſtm. 2. cap.* 1. Tenant in tail ſhall not have power to alien to the prejudice of his iſſue, but otherwiſe it is voidable. Tenant in tail grants a rent-charge, it is void againſt the iſſue, tenant in tail makes a leaſe without reſerving a rent, it is void. *Plow.* 436. 12 *H.* 8. 8. The reaſon of theſe caſes is, becauſe it is an apparent prejudice to the iſſue; and the ſtatute doth not meaſure the acts which the tenant in tail doth by his eſtate, but with the conſequence of the prejudice that may come to the iſſue by them; and here is an apparent prejudice; for if he may make a leaſe *in futuro* he will deprive his iſſue of the liberty of alienation according to the ſtatute, and alſo to levy a fine. This upon the reaſon ſince the ſtatutes of 32 *H.* 8. 4 *H.* 7. 6 *Co.* 41. 1 *Inſt.* 223. This leaſe is a clog. 2. This leaſe being by way of future intereſt, the iſſue is in paramount this future intereſt, for it is not an eſtate until it is executed, for a ſurrender may be notwithſtanding it. When tenant in tail makes a leaſe *in futuro* the ſtatute preſerves the iſſue. *Cro. Jac.* 445. *Griffin*'s caſe. A leaſe after death is void, although a rent be reſerved. *Dyer* 279. *per Manwood.*

As to the 2*d*, The conuſee ſhall have the ſame power, *Plowd.* 437. *Smith* verſus *Stapleton.* Feoffee may enter upon leſſee, 1 *Inſt.* 46. *b.* and no difference betwixt conuſee and feoffee.

Object. Dyer 51. Tenant in tail makes a feoffment, and makes a leaſe for years.

Reſp. No reſemblance, for when tenant in tail makes a feoffment the tail is diſcontinued, and then the joining with the feoffee is good.

Object. Cro. Jac. 692. *Croker* verſus *Kelſey.*

Reſp. The iſſue there had barred the intail and himſelf, and therefore the conuſee ſhall not have more power than the tenant in tail himſelf.

Winnington for the defendant. This leaſe is purſuant to the power, which is to be regarded at the time of the creation; poſſeſſion may be applied when it is to take effect in poſſeſſion. Intent of the parties, I confeſs, *Hawkin*'s caſe in *Cro. Jac.* 318. to be againſt this opinion, but the record of that caſe doth not warrant it. And *Yelv.* 222. reports the ſame caſe wholly different from *Crook*; but admit that the power is not purſued, yet 1. This leaſe is only voidable. 2. Not voidable by the conuſee.

As

* As to the 1*st*, Tenant in tail makes a leaſe *in futuro*, rendering rent, this leaſe is only voidable. *Plow.* 434. is a caſe in point. 1 *Inſt.* 46. * P. 134.

Object. Dyer 279.

Reſp. Catlin there denies the opinion of *Manwood*. It had been good although no rent had been reſerved, till avoided. *Hutt.* 102.

To the 2*d*, The conuſee cannot avoid this leaſe. *Weſtm.* 2. *de donis*. The iſſue hath power to elect *poſt prolem ſuſcitatam*, tenant in tail hath power by the common law. The conuſee doth not come in in privity of the eſtate-tail. *Dyer* 51. *b.* 7 *Co.* 9. *Count de Bedford*'s caſe. Tenant in tail makes a leaſe *in futuro*, and then levies a fine, the leſſee enters, the conuſee enters upon him, and the fine is reverſed. *Dyer* 263.

Kelyng juſtice. The firſt point concerning the power is the principal point; tenant in tail makes a leaſe *in futuro*, it is not void, but voidable only, and the conuſee ſhall here have advantage of election as well as the iſſue.

Wyndham juſtice. If the leaſe be in *Eſſe* at the time of the ſettlement. A leaſe made by the power to commence after the leaſe in being is determined, is good. *Dyer* 357. There is a difference when the land is in poſſeſſion, and when it is in leaſe. Tenant in tail makes a leaſe without rent, it is not void, but voidable. becauſe there may be covenants in it, and there is alſo fealty, *&c.*

Twiſden juſtice. Powers are to be expounded according to the intent of the parties. Tenant in tail makes a leaſe, it is only voidable, the conuſee ſhall not avoid it, becauſe the eſtate-tail is barred, and he cannot come in in privity; and matter of election is transferable. *Latch*, *Arnold* and *Warner*'s caſe. And it was adjourned.

Winne *verſus* Lloyd. *See before.*

A WRIT of error was brought to reverſe a common recovery in *Wales*, and judgment in the common recovery is affirmed; and now *Williams* moved for coſts for the defendant in the writ of error, according to 3 *H.* 7. *cap.* 10. he cited *Co. Inſt.* 162. *Cro. Eliz. Grove*'s caſe, and *Cro. Eliz. Penruddock*'s caſe; and although there is not any delay here according to the words of the ſtatute, yet this is to be intended where execution may be; but here is no * execution to be had. But the court denied to give * P. 135. coſts, Error. Antea 16, 59, 70, 96.

costs, because there is not any delay of execution; and at the common law there was no costs in a writ of error.

Low *versus* Beardmore.

Case.
2 Danv. Abr. 210. p. 11.
1 Lev. 169.
1 Sid. 261.
1 Keb. 881, 915.

AN action upon the case against the defendant for falsely and maliciously indicting the plaintiff for a rescous. And on Not guilty found for the plaintiff,

Powis for the defendant moved in arrest of judgment, that such action upon the case doth not lie for indicting one for a bare trespass, and this indictment was but a trespass.

And as to the *objection*, That the plaintiff declared, that the defendant *scienter* indicted him,

Resp. It is the common declaration which is *falso & malitiose*.

Wyndham justice. The case of *Langly* and *Clark* was debated for an action for an indictment for taking his wife with an intent to ravish her; and it seemed there for the defendant.

Mich. 1659. *Chamberlain* versus *Prescot*. The Plaintiff brought a special action upon the case for maliciously indicting him upon 8 *Eliz. cap.* 2. for procuring the defendant to be arrested in another man's name, who disowned the suit; and the plaintiff declares that he being a freeman of *London*, and a merchant, and reciting the statute, the defendant caused him falsely and maliciously to be indicted upon that statute. And upon Not guilty pleaded, and a verdict for the plaintiff, *Allen* moved in arrest of judgment that this action would not lie, it being only a trespass in its nature; and if it should be allowed, it would discourage prosecutors: But notwithstanding the plaintiff had his judgment.

Twisden justice. In *Chamberlain* and *Prescot*'s case, it was resolved in this court, that the action lies for such indictment; but the judgment was after reversed in the exchequer chamber; but it seemed a hard case if the action should not lie.

Kelyng for the defendant. Such actions would deter men from prosecuting, and he seemed to be for the defendant; but it was adjourned. *Vid. postea Henly* versus *Burstal* 180.

Jemot *versus* Cooly.

Estate.
3 Danv. Abr. 163. p. 4.
1 Lev. 170.
1 Vent. 193.
1 Saund. 112.
1 Sid. 223, 262, 344.
* P. 136.
1 Keb. 784, 915.
2 Keb. 20, 184, 270, 295.
3 Keb. 6.
Postea 158.

EJECTMENT of the demise of sir *Ralph Bovey* of lands in *Amersham* in the county of *Bucks*; on Not guilty pleaded, the jury found a special verdict, *viz.* That *Francis Drake* 20 *July* 1651. for 600*l.* granted a rent-charge to the lessor of the plaintiff of 42*l.* a year, and in the deed was * this clause; And the said *Drake* doth grant that if the said rent shall be in arrear at any of the days of payment above twenty days, that then it shall be lawful to and for the said *Bovey* to enter into the said lands, and the same

ſame to retain until he be ſatisfied the ſaid arrears. The rent is behind at one of the days, and the leſſor enters and demiſes to the plaintiff.

Jones for the plaintiff. The ſole queſtion is, if the leſſor of the plaintiff hath any intereſt in the land it ſelf by theſe words. Here it is not any queſtion, If the intereſt be an inheritance, freehold or chattel, becauſe ſir *Ralph Bovey* is alive; but that this eſtate is an intereſt. *Littleton ſect.* 327. There it is not a condition, becauſe then he ought to avoid the whole eſtate by his entry. 1 *Inſt.* 217. This intereſt is a chattel created by the agreement of the parties. *Littleton* doth not put it by deed indented, but it ought to be ſo intended; for a feoffment in fee rendering rent cannot be without deed, becauſe not good by way of reſervation. 1 *Inſt.* 143. It hath been held that a rent upon a feoffment may be by deed poll. *Doct. & Stud.* 74. 11 *H.* 7. 22. 14 *H.* 7. 36. This intereſt is a chattel, becauſe it is a penalty annexed to the rent. *Cro. Jac.* 510. *Havergil* verſus *Hare.*

Object. It is a fee, becauſe heirs is in, and then it doth not paſs without livery.

Reſp. Theſe words do not deſign what eſtate, but who ſhall have the remedy.

Authorities in the point, *Hill.* 13 *Jac. C. B. Rot.* 868. *Brown* verſus *Hagger*, cited in *Price* and *Vaughan*'s caſe. If tenant by *Elegit* make a leaſe to try a title, it is good, although he hath an incertain intereſt. 1657. *B. R. Harriſon*'s caſe, the caſe of a tenant-right.

Thurſby for the defendant. It cannot be a chattel-intereſt becauſe incertain. *Lit. Sect.* 380. *Bracton, Britton, &c.* do not mention any ſuch incertain intereſt. 37 *H.* 6. 26. *Quas tenuit dum ſola fuit, quamdiu ſe bene geſſerit.* 4 *Co.* 30. *Durante viduitate. Bro. Leaſes* 67. *Pet. Bro. ſect.* 462, & 463. *ibid.* & 468. But it doth not appear that livery was made. 14 *H.* 8. 10. & 14. 8 *Co.* 96. *Cordel*'s caſe, It cannot be raiſed by grant. 1 *Inſt.* 42. and the reaſon is becauſe ſuppoſe the land will not anſwer the debt, then it ſhall be a perpetual chattel, yet 258. *Green* verſus *Edwards*, at ſome times it may be created, 1. By parliament, as tenancy by *Elegit.* 2. Things in a grant may be ſo, as a rent. 11 *Aſſ. pl.* 8. Common 17 *Aſſ. pl.* 7. In the caſe of the king. 8 *H.* 4. 17. *Quamdiu in propriis * manibus*, becauſe no other ceremony is requiſite, but here it is in the caſe of land. 3. In caſe of a will it may be ſo granted. *Cro. Eliz.* 315. *Cordel*'s caſe, 3. *H.* 7. 13. 4 *Co.* 82. 4. In a feoffment upon condition to hold till the feoffee be ſatisfied, * P. 137.

ſatisfied, &c. *Litt. ſect.* 327. 44 *Aſſ. pl.* 3. *Plowd.* 524. *Fitzh. Barr* 280. & *Done* 210. but this is only as a pledge, and not an eſtate. In caſe of a replevin, a condition may be ſo. 1 *Inſt.* 146. *Fortior eſt obligatio hominis quam legis.* It is not an eſtate for years, nor a freehold. Not a freehold, 1. Becauſe it commences in *futuro*. 2. It is without livery, and therefore it is only an eſtate at will, and it is not found that it is not determined. Tenant at will cannot make a leaſe to try his title againſt his leſſor, *Blundel* and *Baugh*'s caſe; and here the defendant enters by command of the leſſor.

Twiſden juſtice. The caſe cited of *Brown* and *Hagger* is material.

Wyndham juſtice. The leſſor hath only an eſtate at will.

Kelyng juſtice. The caſe of *Littleton* cannot be maintained by reaſon, but only by the authority of the author. and it was adjourned. *Vid. poſtea.*

Marke *verſus* Johnſon.

Office. 1 Keb. 898, 919.

IN an ejectment. On not guilty pleaded, the jury found a ſpecial verdict, which was in effect, That a leaſe is made by the king for years, provided that upon non-payment of the rent the leaſe ſhall be void. And the queſtion was, If the rent is arrear, the king may grant this term *de novo*, without finding by office that the rent was unpaid at the day.

21 Jac. c. 25.

Kelyng juſtice. The ſtatute of 21 *Jac. cap.* 25. makes an alteration of the common law; for now a leaſe ſhall not be void, as before; but now an office ought to be found, that the rent is not paid, and here is no office found: but upon this ſpecial verdict there is a ſpecial concluſion, and therefore good enough. But it was adjourned.

Thatcher *verſus* Ullocke.

Pleading. 1 Keb. 910.

IN treſpaſs *Quare clauſum fregit.* The defendant pleads, that *H.* 8. was ſeiſed in fee, and ſo the lands deſcended to the king that now is, and that he as ſervant, &c. The plaintiff replies, that *H.* 8. granted to the plaintiff. and
* P. 138. doth * not traverſe the dying ſeized of king *Charles the Firſt*, and it might come to the king otherwiſe. *Dyer* 170.

Twiſden

Twiſden juſtice. A traverſe needs not, and if it came to the king again, this ought to be ſhewn in the rejoinder; the laſt ſeiſin ſhall be traverſed, if it might be gained by diſſeiſin. *Adjourned.*

The King *verſus* Wagſtaffe and others.

WAGSTAFFE and others, citizens of *London*, being ſworn upon a petty jury at the ſeſſions at the *Old-Baily*, to try *Goſſe* and divers others, indicted upon the late ſtatute of conformity, refuſed to find the parties indicted guilty, contrary to their evidence, which in the opinion of the judge was full and pregnant; and upon this the court fined them 100 marks a-piece, and ordered them to be impriſoned till they paid the ſaid fine. And now they bring a *Habeas Corpus*, and upon the return of this, all this whole matter appeared, and upon mature conſideration they were remanded.

Juror. Hard. 401. 1 Sid. 272. 1 Keb. 934, 938. — ſo. 99. See before *Leeche*'s caſe.

And by juſtice *Kelyng* (who was in the ſame court, and gave the rule at the ſame ſeſſions for the ſame fine and impriſonment) It is clear that the law is ſo; yet ſee *Hollinſhead Chron. par.* 1. *lib.* 2. *cap.* 4. *fo.* 155. and *part* 2. 1405, and 1126. *Throckmorton*'s caſe, and *Leeche*'s caſe before.

12 Co. 23. Jurors are puniſhable in the Star-Chamber.

And by *Twiſden* juſtice. The judge is intruſted with the liberties of the people, and his ſaying is the law, and a man could not have a bill of exceptions at the common law, till *Weſtm.* 2. And now this doth not lie in matters of the crown. And ſo it was adjudged, that the return was ſufficient, and the priſoners were remanded.

* P. 139. * Term. Mich. 17 Car. 2. B. R.

THIS term was adjourned to *Oxford* by reaſon of the plague in *London*; and in this term no ſpecial verdict was argued, nor judgment given upon any demurrer, or ſpecial verdict by order and proclamation. And only two returns of the term kept, that is to ſay, *Octabis & Martini*. And this term juſtice *Kelyng*, who was *puiſne* judge, was made now lord chief juſtice, and ſir *William Moreton* knight, the king's *puiſne* ſerjeant, was made a judge in the place of juſtice *Kelyng*.

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* P. 140. * Term. Paſch. 1653. C. B.

Intr. Hill. 1651. Rot. 1732.

Thomas Corbet *Plaintiff*, Francis Stone *Defendant*.

Hartford. Remainder.

IN *Ejectione Firmæ*. The plaintiff declares upon a demiſe of *Robert Slingsby* Eſquire, of one meſſuage, 200 *acres* of land, 60 acres of paſture, 40 acres of meadow, 20 acres of wood in *Barkeway*, dated the 11*th* of *Auguſt* 1651. *Habendum* for ſeven years from the 10*th* of *Auguſt aforeſaid*. The defendant pleads Not guilty. And the jury at the bar gave a ſpecial verdict.

As to the houſe and 60 acres of land, &c. That *Frances* Ducheſs of *Richmond* was ſeiſed thereof in fee, and being ſo ſeiſed, *June* 1632. 8 *Car.* 1. By indenture made between her of the one part, and *John* lord *Powlet*, ſir *Edward Gourdon*, ſir *Edward Hungerford*, and ſir *Richard Young*, of the other part, in conſideration that *Henry Prannel*, her late huſband, did out of his affection convey (amongſt

(amongſt others) the lands in queſtion to her and her heirs, and that ſhe had no iſſue of her own to inherit, ſhe by way of loving contribution thought fit to convey the ſame to his next heirs, and for execution thereof did demiſe the ſame to the ſaid *John* lord *Pawlet* and the reſt; To have and to hold to them from thenceforth for 40 years, if ſhe lived ſo long, in truſt that ſhe might receive the profits during her life; And after her deceaſe, then the one moiety thereof ſhall be, remain and come unto *Mary Clark*, wife of *John Clark* Eſquire, eldeſt ſiſter of the ſaid *Henry Prannel*, and the other moiety unto *Joan Brook* widow, ſome time the wife of *Robert Brook* Eſquire deceaſed, and to their executors, adminiſtrators and aſſigns ſeverally and reſpectively, for and during the term of 1000 years from the death of the ſaid *Frances*.

Trin. 10 *Car.* 1. after a certain fine was levied with proclamations, &c. by the ſaid *John Clark* and *Mary* his wife, and find it *in hæc verba*.

* And it is of the moiety of the manor of *Newſils*, &c. and other lands. * P. 141.

That afterwards the 21*ſt* of *February* 1634. By indenture between the ſaid *Joan Brook* of the one part, and *Frances Brook* and *Katharine Brook* of the other part, the ſaid *Joan Brook* did thereby recite the ſaid indenture made by the ſaid ducheſs and the grounds thereof; And did grant unto the ſaid *Frances Brook* and *Katharine Brook* her two daughters the ſaid term and intereſt of 1000 years in the ſaid moiety.

That the 3*d* of *June* 1637. The ſaid ducheſs and *Henry Brook* did ſeal and deliver an indenture made between her and one *Denzil Hollis*, and *Dorothy* his wife, and the ſaid *Henry Brook* of the one part, and ſir *Richard Young* and *Edward Savage* of the other part, Whereby in conſideration of her near alliance to the noble and princely family of the *Howards*, and the ſupport of the high titles and dignities that may come and deſcend to *Thomas Howard*, grandchild and heir apparent of the then earl of *Arundel*, ſhe covenants with ſir *Richard Young* and *Savage*, that ſhe will before St. *Andrew*'s day next levy a fine of all thoſe manors of *Newſils*, and of all other her lands in the county of *Hartford*, to the uſe of her ſelf for life, afterwards to *Thomas Howard* aforeſaid for life, remainder to his firſt ſon, &c. in tail male, &c. with divers remainders over.

Trin. 13 *Car.* 1. The fine was levied, &c.

That the ducheſs at the making of the deed, 21 *Feb.* 1634. and at the fine levied continued poſſeſſion.

And that ſir *Richard Young* in the firſt deed, and ſir *Richard Young* in the fine, is the ſame perſon.

Ult. Octobris 1639. The ducheſs died.

3 *Nov.* 1639. The ſaid *Thomas Howard* the younger, now earl of *Arundel*, entered, claiming by the ſame fine and indenture.

That after the ſaid fine levied and before the ejectment leaſe, the intereſt of the ſaid *Mary Clark*, and of the ſaid *Frances Brook* and *Katharine Brook*, to the lands in queſtion, came to the leſſor, *Robert Slingsby*.

Afterwards and before the ejectment leaſe the ſaid *Joan Brook* died inteſtate.

Afterwards, &c. 50 *Junii* 1651. adminiſtration was committed to the ſaid *Robert Slingsby*, who afterwards upon the poſſeſſion of the ſaid earl did enter and was poſſeſſed *prout*, &c. who the ſaid 11*th* of *Auguſt* 1651. made the leaſe to the plaintiff *prout* in the declaration, who was poſſeſſed until the defendant *Stone* did by command of the ſaid now
* P. 142. earl of * *Arundel* enter upon him, and actually eject him. And if for the plaintiff, for the plaintiff; and if for the defendant, for the defendant.

Glyn ſerjeant. I pray judgment for the plaintiff.

The points are, 1. Whether the eſtate limited to 1. *Mary Clark*, 2. *Joan Brook*, be good, and what kind of eſtate?

2. Whether the fine levied by *Mary Clark*, and her huſband, 10 *Car.* 1. do operate any thing upon her intereſt?

3. Whether the fine levied by the ducheſs doth turn the eſtate of the ſiſters to a right, ſo that they can any way be barred thereby by that fine and non-claim?

4. Whether a good title be found by the jury for the leſſor Mr. *Slingsby*?

1. Point. I conceive the limitation to *Mary Clark* and *Joan Brook* is a good remainder for 1000 years.

Every deed ſhall be taken moſt ſtrictly againſt him that makes it. And if it cannot take effect as the parties expreſs; yet it ſhall take effect as it may, rather than the deed ſhall be void. *Bredon*'s caſe, 1 *Co.* 76. If tenant for life, the remainder in tail, the remainder over, tenant for life and he in the firſt remainder levy a fine *ſur conuſance*, &c. to another in fee, who renders a rent-charge to the tenant for life; reſoved this is no forfeiture or diſcontinuance; *ut res magis valeat quam pereat*. And the law conſtrues this, the grant of the remainder man firſt, and after the grant of tenant for life. 38 *H.* 8. *Bro. Fine* 118. there cited. If tenant in tail, and *A.* levy a fine to a ſtranger, who grants and renders to *A.* for years, rendering rent, and by the ſame fine

fine grants the reverſion to tenant in tail and his heirs, this is good. And although all be by one fine in an inſtant, yet in judgment of law the leaſe precedes the grant of the reverſion, *ut res magis valeat.*

30 *Aſſ. pl.* 47. If tenant for life, and he in reverſion in fee make a feoffment by parol, it ſhall be the ſurrender of tenant for life, and the feoffment of the reverſioner. But if by deed, otherwiſe. *Vid.* 6 *Co.* 14. 15. *Treport's* caſe applied.

In this caſe it appears, that the intention of the ducheſs was to give an eſtate for 1000 years, and the words are, *And after her deceaſe, then the one moiety ſhall be, remain and come, &c.* And the ſcope of the deed was that ſhe would advance her nieces, being the ſiſters of *Prannel* her former huſband.

1. *Object.* That no eſtate paſſed becauſe it is by indenture, and the ſiſters not parties, and ſo they cannot take. *Hob.* 313. *Winſmore's* caſe, 314. *Greenwood.*

* *Reſp.* The difference will be between a preſent eſtate and an eſtate in remainder. It's true, he that is not party to the indenture, cannot thereby take a preſent eſtate, but may take by way of remainder. *Lit. ſect.* 374. proves this, where he puts the caſe, If a man by indenture grant an eſtate to *H.* for life, the remainder to another in fee, upon condition, this is a good remainder, and he ſhall be bound to perform the condition though he was no party. 1 *Inſt.* 131. *Coke* on this ſection takes this very difference that I have taken. And *Hob.* 313, 314. are judgments in the very point, with that difference. *Greenwood's* caſe was, lord *Sturton* ſeiſed in fee, by indenture demiſed to *Thomas Hobart, Habend.* to the ſaid *Thomas Hobart* and *Michael Hobart*, and to one *John Hobart* and *Henry Hobart*, the ſons of *Thomas*, for term of their lives, and the life of the longer liver of them *ſucceſſivè*. Reſolved by the court upon great debate, that none could take immediately, but *Thomas Hobart*, becauſe he is only party to the deed, and the reſt not named but by the *Habendum*, then they cannot take but by way of remainder; yet in this caſe they could not ſo, becauſe of the incertainty who ſhould take firſt, according to the book of 20 *Eliz. Dyer*, the words being omitted *prout nominatur in Charta*, and the ſame difference agreed in *Greenwood's* caſe, *fol.* 314. * P. 143.

2. *Object.* That the ſiſters were not named in the premiſſes.

Reſp. That is not material; and in truth when a remainder is limited it is moſt proper to come in the *Habend.* and

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it cannot be otherwiſe; and the caſes before cited grant the eſtates in the *Habend.* The common conveyances of *England* prove it; A leaſe for life to *A.* remainder to the right heirs of *J. S.* 2 *Co.* 81. *Bredon's* caſe, &c. *Plow.* 160. *Tracy* and *Nicholſon's* caſe 93. An eſtate may be granted in the *Habend.* to whom none is in the premiſſes. So I conclude this point that *Mary Clark* and *Joan Brook* have a good remainder for 1000 years.

1. Becauſe the grant ſhall be expounded beſt for the grantees.

2. Becauſe of the intention.

3. It hath a preſent eſtate to ſupport it.

Now the next queſtion upon this point will be, What kind of remainder this is, *viz.* Whether a remainder veſting preſently or a contingent?

It is a contingent remainder. For the leaſe made by the ducheſs to the lord *Pawlet*, &c. is for forty years, if ſhe
* P. 144. * live ſo long; and after her death, to come, remain and be as to one moiety to, &c. ſo the remainder is not after the end of the term, but after the death of the ducheſs, which may be within the forty years, or after the forty years; ſo that its doubtful whether the remainder will veſt *eo inſtanti* that the precedent particular eſtate ſhall end or not.

In which caſe by the rule of our books the remainder is contingent. 3 *Co.* 20. in *Boraſton's* caſe. If one grant to *J. S.* for life, remainder to the right heirs of *J. D.* this is a contingent remainder, *viz.* It's a good remainder if *J. D.* dies in the life of *J. S.* but otherwiſe if *J. S.* dies before this veſt.

10 *Co.* 17. *Lampet's* caſe. A termor deviſes his term to *A.* for life, remainder to *B.* It is there agreed that this is a contingent poſſibility. Upon the ſame reaſon, if *A.* ſhall live after the term, the remainder ſhall never veſt; but if during the term he dies, it ſhall veſt.

In *Plowd.* the caſe put in *Colthurſt's* caſe, A leaſe is made to *A.* for life, the remainder to *B.* for life; if *B.* dies before *A.* the remainder to *C.* for life, this is a good remainder upon a contingency, *viz.* if *B.* dies before *A.*

So in our caſe the leaſe is made to the lord *Pawlet* and others for forty years, if the ducheſs live ſo long, and after her death the remainder to *Mary Clark* and *Joan Brook* for 1000 years; this is a contingent remainder; for the particular eſtate on which it depends is the eſtate for forty years, which may or not determine before her death; if it determine before, then the remainder, as a remainder, is gone.

Object.

Object. My brother *Bernard* would ſeem to object that this remainder ſhould not be good becauſe of that manner of limitation; for it is not to begin after the forty years, but after the death; and ſo the life of the ducheſs interpoſed, and compares it to the caſe put in *Colthurſt*'s caſe, *Plowd.* 25. If the eſtate be limited to *A.* for life, and after the death of *A.* and one day after, to remain to *D.* for life, that is a void remainder, which is law.

Reſp. But the reaſon is becauſe there is no probability for the remainder to veſt when the particular eſtate ends, which is a neceſſary incident to every remainder: but there is a poſſibility in our caſe, for if the ducheſs die within the forty years, then the particular eſtate ends when the remainder commenceth. This is expreſſly agreed in 3 *Co.* 20. *Boraſton*'s caſe. If a leaſe be made to *A.* for twenty years, if *B.* ſhall ſo long live, and after the death of *B.* a remainder over in fee, this remainder is void, becauſe if the remainder ſhall * be good, then ſhall the fee-ſimple be in abeiance, which the law will not ſuffer. But if the remainder had been for years it had been good, for that may be in abeiance; and ſo he concluded the firſt point. * P. 145.

2. Point. Now the eſtate being thus ſettled *(viz.)* a remainder for 1000 years to *Mary Clark* after the death of the ducheſs, the jury find that afterwards *Trin.* 10 *Car.* a certain fine with proclamations thereof made according to the form of the ſtatute by the ſaid *John Clark*, and the ſaid *Mary Clark* his wife, in *C. B.* the tenor whereof followeth, and recites *in hæc verba, &c.* whereby it appears, that *Thomas Roper*, Eſq; and *Robert Pickring* were plaintiffs, *John Clark* and *Mary* his wife deforciants. The fine was of the moiety of the manor of *Newſils Rookey*, *Walter Andros* and *Berwick*, eight meſſuages, four cottages, and three toftes, and divers numbers of acres in *Barkway*, *Barley* and *Royſton*; ſo the point is whether *Mary Clark* by this fine hath paſſed away her intereſt, or extinguiſhed it in the lands in queſtion: And he held ſhe had not.

1. Becauſe it is not found that the fine was levied of the lands in queſtion, and if it be not found, being matter of fact, the court will not preſume it.

Object. That it appears that the fine is levied of lands of the ſame name, and in the ſame place, as are mentioned in the indenture of *June* 1632.

Reſp. If it were ſo, unleſs the jury find it to be the ſame lands, the court cannot preſume it; for it may be of lands of the ſame name and in the ſame place, and yet not the

ſame

ſame lands; and the preſumption is againſt it; for if it had been the ſame, the jury would have found it ſo: and it were dangerous for the court to ſupply it by intendment, for thereby they might ſubject the jury to an attaint.

2. But in truth it doth not appear the fine was levied of lands in the ſame place or name, as in the indenture of *June* 1632.

For the lands given *Mary Clark* by the indenture are the moiety of the manor of *Newſils*, &c. ſituate in the pariſhes of *Barley*, *Read* and *Royſton* in the counties of *Hartford* and *Cambridge*, or one of them; and the fine is of lands in the county of *Hartford*, and ſo *non conſtat* whether the ſame.

* P. 146. * 2. Admit the fine were of the ſame lands; yet I conceive the eſtate of *Mary Clark* is neither given away or extinguiſhed.

The caſe for that is,

The lord *Pawlet* is leſſee for forty years, if the ducheſs live ſo long; this is in truſt that the ducheſs might receive the profits, the remainder after the death of the ducheſs to *Mary Clark* for 1000 years. The ducheſs being in poſſeſſion, *Mary Clark* levies a fine to a ſtranger *ſur conuſance de droit come ceo*, &c.

1. Nothing paſſeth from *Mary Clark*; for *Mary* during the life of the ducheſs, hath not any intereſt in her to grant; for the remainder being contingent is not grantable over, 10 *Co.* 47. *Lampet*'s caſe, reſolved, Deviſe of a term to *A.* for life, and after his death to *B.* this being but a poſſibility is not grantable during the life of *A.* and yet this is an executory deviſe, which is much favoured, 4 *Co.* 66. *b.* in *Fulwood*'s caſe accordingly, and 8 *Co. Mathew Manning*'s caſe. One deviſes a term to baron and feme for one and twenty years, remainder to the ſurvivor of them; neither baron nor feme during their joint lives may grant this over; ſo that with ſome clearneſs he held that the fine doth not give the eſtate of *Mary Clark*, becauſe it is not grantable.

2. This contingent remainder is not by the fine either releaſed or extinguiſhed, 10 *Co.* 48. in *Lampet*'s caſe, it is ſaid, that a right or title to a freehold or inheritance, whether it be preſent or future, may be releaſed in five manners. 1. To the tenant of the freehold in deed or in law without privity. 2. To the tenant in remainder. 3. To him in reverſion without any privity; but an eſtate cannot be enlarged ſo. 4. To him that hath a right only in reſpect of privity, as if a tenant be diſſeiſed, and the lord releaſe the ſervices to the diſſeiſee. 5. In reſpect of privity without right. But in our caſe the conuſees of the fine

fine levied by *Mary Clark* have not any of theſe qualities, for they have neither eſtate in the land in queſtion, nor privity, or right, &c. therefore the fine cannot operate by way of releaſe.

3. By way of extinguiſhment or eſtoppel it cannot be; for the right in remainder is not in the conuſor; and it is not an eſtoppel to any but thoſe who claim under the conuſees of the fine; for an eſtranger ſhall not take advantage of it, becauſe it is not reciprocal. *Vid.* 2 *Co. Buckler's* caſe.

* 3. Point. If the fine levied by the ducheſs to ſir *Richard Young* puts the remainder to a right, ſo that for default of entry within five years, this is a bar, or the remainder is deſtroyed. I hold that the fine doth not touch either the eſtate for forty years, nor the remainder for 1000 years. * P. 147.

As to that, the caſe is, the lord *Pawlet* and ſir *Richard Young* are leſſees for forty years, if the ducheſs live ſo long, the remainder over to the ſiſters. Now the clauſe in the indenture is, that the ducheſs ſhall take the profits, and the continuance in poſſeſſion makes her leſſee at will to the lord *Pawlet* and ſir *Richard Young*.

Now that ſhe is tenant at will, *Vid.* 1 *Inſt.* 171. *a.* If *H.* enter into lands by the conſent of the owner, he is tenant at will, *Littl.* 108. *H.* makes a feoffment in fee upon condition to perform his will, and the feoffor enters, *Littleton's* opinion is, that he is tenant at will; *Coke* is of that opinion, and ſo upon debate it was reſolved, *Hill.* 11 *Car.* 1. *B. R.* betwixt *Wilkinſon* and *Meriam*, *Cro. Car.* 323. In caſe of a mortgage the perception of the profits doth make the mortgagor become tenant at will to the mortgagee, and there adjudged that the mortgagee might deviſe the lands, *Cro. Jac. Powſeley* and *Blackman*; ſo that the ducheſs here hath a rightful poſſeſſion, and a fee-ſimple in the reverſion. And then I conceive the fine doth not ſtir any of the eſtates for years, for theſe reaſons.

1. Becauſe it is a fine which works by way of grant, and if there be an eſtate large enough in the grantor to ſatisfy the grant, the law will never expound it a tort, if it may be otherwiſe. Now the ducheſs by fine grants a fee-ſimple, and ſhe hath a fee-ſimple to grant, and therefore no wrong: upon this reaſon it is in 1 *Co.* 76. *Bredon's* caſe, tenant for life, remainder in tail, tenant for life and he in the firſt remainder levy a fine to a ſtranger; adjudged there that it is not any forfeiture of the eſtate for life, neither

ther any discontinuance of the remainder, because it is by fine; yet in this case, if it had been by feoffment without deed, it is there agreed to be a forfeiture and discontinuance. But any estate by fine that operates by way of grant, the law to avoid wrong expounds it so, That every one grants that that he may lawfully grant. 10 *Co.* 98. sir *Edward Seymour*'s case. Upon the same reason, if tenant in tail
* P. 148. bargain and sell in fee, and then levies a * fine, this fine shall work no discontinuance or wrong. But the law to avoid a tort doth expound it to operate upon the base fee that was formerly granted, which wrought no discontinuance, as it is there adjudged; and yet if the fine had been levied before the bargain and sale, there it had been a discontinuance; for then the law had had no means to expound it otherwise.

2. *Reason.* Because the dutchess being tenant at will continues the possession, as well at the time of the fine levied, as after, even to her death; and the possession of the tenant at will is the possession of him in remainder, and this preserves the estate without any wrong done to it, or turning it to a right. 1 *Inst.* 270. The possession of the particular tenant is the possession of the lessor, and the possession of the remainders. The possession of a guardian in chivalry or a guardian in socage is the possession of him in reversion. 29 *Assises pl.* 161. 20 *Assises pl.* 9. 22 *E.* 4. 14. *a. &c.* And the possession of a tenant at will doth much more intitle him in reversion to the possession than any other. For if tenant at will commit any voluntary waste and dies, and his heir enters, in such case the lessor may have an action of trespass *vi & armis, &c.* without any entry. *Litt. sect.* 82. 5 *Co.* 13. 10 *E.* 4. 18. 21 *H.* 7. 12. But in case of tenant at sufferance the lessor cannot have trespass without entry. Hence follows that the possession of the dutchess is the possession of the lessor, so long as the will continues. The levying of the fine by the dutchess is no determination of the will, for she continues her possession still; and the levying of the fine by her is a lawful act, and a lawful act shall never determine the will. 1 *Inst.* 85. A lease at will reserving the trees, *&c.* If the will be determined yet her continuance in possession makes her tenant at sufferance, which still continues the possession of the lessor. And the fine being a lawful act doth not turn the estate to a right. 9 *Co.* 104. *Podger*'s case, 10 *Co.* 96. *Seymour*'s case.

The 3d, and main reason. Because the fine is levied to sir *Richard Young*, who is one of the lessees for years, and by

by the statute of 27 *H.* 8. *cap.* 10. the estate of sir *Richard Young* is expresly saved, as appears by 7 *Co. Lillingston*'s case. If there be lessee for years to the use of another, and the lessor infeoff the lessee for years to uses, the term for years is saved by the proviso of the statute. So if the * lord infeoff a copyholder to the use of another, the copyholder's estate is preserved. Then if the estate of sir *Richard Young* by expres *proviso* of the statute of 27 *H.* 8. is saved, and no wrong done to it, it follows that the remainder is not touched. * P. 149.

The conclusion. If by the fine no wrong is done, and the estate for years not turned to a right, then no bar can be, and no claim is necessary; and this is resolved 5 *Co.* 124. *Sander*'s case, cited to be adjudged in *Saffins*'s case. If a man hath a future interest, and the lessor is disseised, and the disseisor levies a fine, the future interest is not touched, and because it is not turned to a right he is not bound to make claim. And the case put out of *Plowd.* 373. *Stowel*'s case. If *H.* levy a fine in which another hath title of common, and five years pass, the commoner is not barred, because the fine doth not do any wrong to it.

3 *Co.* 77. *Farmer*'s case, Agreed that a fine and non-claim doth not bind the estate, but the right; and therefore when the fine doth not turn the estate to a right there needs no claim. 9 *Co.* 105. *Margaret Podger*'s case.

2d Resolution. That no fine bars any estate in possession, reversion or remainder, which is not devested and put to a right; and there it is also said, that he that at the time hath not any title of entry shall not be barred, so the possession continuing in the lessees, and not being turned to a right, there it is not touched nor barred by the fine.

4th Reason. Because the remainder limited to *Mary Clark* and *Joan Brook* is contingent, so that at the time of the fine levied it is not vested in them, but in the custody of the law, in which case a fine levied by a stranger doth not bar it, 9 *Co. Podger*'s case, It is said when the estate is so settled, that he who claims the interest of it, cannot by any possibility enter and make his claim, he shall not be barred by the statute; for it is not reason that he shall be barred by non-claim who is not guilty of any laches; and therefore *H.* who had a future interest at the time of the fine levied shall not be barred. So in the case of feoffee upon condition, if he levy a fine, and five years pass, and then the condition is broken, he is not barred. And now in our case at the time of the fine levied the sisters could not enter, for

for their estate was not in them, and therefore not touched, *Hill.* 29 *Eliz. Rot.* 824o *C. B. Grant*'s case. *John Grant* * P. 150. seised of lands * in fee, held in socage, devises them to his nephew *John Grant* when he comes to his age of twenty-five years, to hold to him and the heirs of his body; *John Grant* the nephew, after his age of twenty-one levies a fine of 'em to a stranger, and having issue after attains to his age of twenty-five years, and dies.

Three points were adjudged.

1. That the gift and devise to *John Grant* the nephew, was in contingency and *futuro* at the time of the fine levied.

2. That the estate-tail in contingency was not barred by the statute of 4 *H.* 7.

3. That this estate in contingency was barred by the stat. of 32 *H.* 8. *cap.* 26. And this by force of the words of that statute, *All fines levied by proclamation, &c. of any manners, lands, &c. before the time of the said fine levied, in any wise intailed to the person so levying the fine, or to any of his ancestors:* And this is a resolution for us, and our case is more strong; for in our case the fine is levied by a stranger, but in *Grant*'s case by the party himself, and yet not touched by the statute of 4 *H.* 7. And our case clearly is not within the statute of 32 *H.* 8. for that there is no intail *per que, &c.* And admit the particular estate of 40 years should be turned to a right, and displaced, this right supports the remainder. 1 *Co. Archer*'s case, *Co. Chudleigh*'s case.

Object. The last thing objected was to the verdict, which found, that the interest of *Mary Clark*, *Katharine Brook* and *Frances Brook* came to the lessor, and doth not find how.

Resp. It is good enough; for when the jury finds the interest to come to the lessor, the court intends all circumstances which conduce to that fact; for the court does not doubt when the jury doubts not. 4 *Co. Fullwood*'s case 65. The jury found that *Thomas Castle* came before the recorder of *London*, and mayor of the staple, and acknowledged himself to owe to *Thomas Rivet* 200*l.* Exception was taken, that there was no finding of any statute there, for it was not found that this was *secund' formam Statuti*, and that it was by writing.

Resp. It is good enough, for all circumstances shall be intended.

The court did object and doubt that the remainder limited by the two sisters was void, because, 1. That it could

could not paſs to them by way of preſent eſtate, becauſe they were not parties to the indenture. 2. It could not be a * contingent remainder, being a remainder for years depending on an eſtate for years; and there cannot be a contingent eſtate for years; becauſe a leaſe for years operates by way of contract, and therefore the particular eſtate and the remainder eſtate operate as two diſtinct eſtates grounded upon ſeveral contracts; but it is true, ſuch a remainder may be of a freehold, as upon an eſtate for life, the remainder to the right heirs of *J. S.* and then in law the particular eſtate, and the remainder, is but as one eſtate in law, and is created by the livery. * P. 151.

2. The court objected, that the ſiſters were barred by the fine and non-claim: for admit it be by way of contingent remainder, when the remainder veſts the ſiſters are bound within five years after to enter; as in caſe where tenant in tail, remainder in tail doth levy a fine, and tenant in tail dies without iſſue, he in remainder is bound to enter within five years after the death of the tenant in tail, elſe he is barred. Judgment for the plaintiff.

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* Term. Paſch. 18 Car. 2. B. R. * P. 152.

Mandamus. 1 Lev. 162. 1 Keb. 868, 880. 2 Keb. 1.

MILLS had a *Mandamus* to reſtore him to the place of one of the approved men of *Guilford*; and upon the return appeared juſt cauſe of reſtitution, and upon that the parties ſubmitted by rule of this court to *Onſlow* and *Weſton*, who made an award that *Mills* ſhould be reſtored, and the approved men refuſed to reſtore him. And upon this ſerjeant *Wild* moved for an attachment againſt the approved men. But by the court an attachment doth not lie againſt a corporation: but if it be granted *niſi*, and the corporation will not reſtore him, the court will grant a reſtitution.

Dixon

Privilege.

Dixon had a debt due to him from *Killegrew*, a grand officer of the king's houshold, and for that he could not arrest him, he took *Proces* and outlawed him, and *Killegrew* hearing of it, caused the plaintiff to be imprisoned, and *Dixon* obtained an *Habeas Corpus* of the chief justice in the vacation, and an *Alias* & *Pluries*, and upon speech with the king, the chief justice informed him in this manner (as the chief justice reported in open court, *(viz.) That his servants are free of arrests, and therefore he should not be deprived of them without his leave*; but this privilege is for the advantage of the king, but not for his servants, and therefore they may be sued, so as he be not deprived of them, and so may be outlawed. But notwithstanding this resolution, *Dixon* was arrested again and imprisoned; and now *Kelyng* moved for a *Plur. Habeas Corpus*, and the court granted a *Habeas Corpus* but not a *Pluries*, because none was granted before in open court.

* P. 153. * —— *versus* Harvey *Executrix of Sir* Job Harvey.

Survivor.

IN debt. The defendant pleaded a joint judgment against the testator, and *Erasmus Harvey* who is now alive, and that he had not assets beyond the said judgment to satisfy. The plaintiff demurs; and adjudged for the plaintiff, because the lien survives, and the executrix not liable. *Vide antea* 26. *Edsar* and *Smart*.

Mandamus.

A *Mandamus* was granted to restore the recorder of *Barnstable*, directed to the mayor of the corporation; and he returned *quod non constat nobis*, that he was ever elected; and the return adjudged insufficient, and restitution awarded.

Bretton *versus* Prettiman.

Assumpsit.
1 Danv. Abr. 45. p. 24.
1 Sid. 283.
2 Keb 26, 44.

IN ASSUMPSIT. The plaintiff declares, that the defendant promised, that in consideration that the plaintiff would take an oath that money is due to him, he would pay him; and the plaintiff avers, that he swore before a master in chancery. The defendant demurs; and adjudged for the plaintiff, because it shall be intended an affirmation upon solemn protestation, and not such an oath for which he may be indicted, *Cro. Eliz.* 470. *Knight* versus *Rushworth*, *Mich.* 1658. *Perkins* versus *Binck*. In consideration the plaintiff would come before a master in chancery and swear, he will pay; and adjudged for the plaintiff; and

2 Sid. 123. Perkins *versus* Binck.

here

here the ſubject matter expounds the thing. *Vide Mod. Rep.* 166. *Amy* verſus *Andrews.*

A week before this term ſir *Robert Bernard*, ſerjeant at law, died, who was a baronet, and of the county of *Huntington.*

Term. Trin. 18 Car. 2. B. R.

P. 154.

This term was very defective in buſineſs, and therefore I did not attend above two or three days, in which no caſe remarkable occurred; except the caſe following.

Courts.

PRESENTMENT was in a leet in *Weſtminſter* againſt divers perſons for uſing ſeveral trades, having not ſerved as apprentices for ſeven years, according to the ſtatute of the 5*th* of *Eliz.* and upon this preſentment *Benet* chief bailiff of this liberty would have levied 40*s.* a month upon them, and they removed the preſentments by *Certiorari*; and it was now debated if the leet had conuſance of ſuch things by the laſt clauſe of 31 *Eliz. cap.* 5. and it ſeems not, becauſe the offences there mentioned, and the courts, ſhall be expounded, *reddendo ſingula ſingulis.*

The King *againſt* The Earl of Dorſet, *in Chancery.*

Scire facias.

UPON a *Scire facias* againſt *Richard* earl of *Dorſet*, and others, members of *Sackvile College* in *Eaſt Greenſtead* in *Suſſex*, to ſhew cauſe why the letters patent, which incorporated and conſtituted the ſaid hoſpital, ſhould not be repealed as they concerned *Edward* earl of *Dorſet*, and the heirs males of *Robert* earl of *Dorſet* who was the founder of the ſaid hoſpital, and cancelled, and the inrol-

Poſtea 177.

ment

ment of them vacated. The *Scire facias* recites the will of *Robert*, and that he deviſed to his executors, by which it was provided, that his executors ſhould found and endow the ſaid hoſpital, and make by-laws, and that the heirs of *Robert* ſhould have the patronage and viſitation of the hoſpital; and the king by letters patent intending to incorporate the ſaid hoſpital according to the ſaid will, and that the charitable cure might be performed according to the intent of the founder, conſtituted the corporation, and granted licence to purchaſe the endowment intended. And he farther granted, that *Edward* earl of *Dorſet*, who was heir
* P. 155. * male of the founder, ſhould have the patronage and viſitation. The *Scire facias* recites, That the lady *Thanet*, and the lady *Compton* are heirs of the fonnder, and that *Edward* earl of *Dorſet* had taken upon him the patronage and viſitation of the hoſpital, to the diſinheriſon of the ſaid ladies; and upon this *Scire. fac.* the earl of *Dorſet* demurs in law.

Finch ſolicitor general, for the earl of *Dorſet*; and he ſaid that this *Scire fac.* is rather *Proceſs* in the name of the king, than the *Proceſs* of the king himſelf; and ſuch *Proceſs* doth not conſiſt with the intereſt of the crown; and reduced his argument into five heads. 1. This *Scire fac.* need not to be brought in the name of the king. 2. This *Scire fac.* doth not lie at the ſuit of a ſubject. 3. A *Scire fac.* doth not lie to repeal part of a patent. 4. This patent is good *in toto*. 5. Admit it is not good *in toto*, yet it is not fit to repeal this patent at this time.

As to the firſt. Becauſe the concluſion of the writ is *ad dammum* of a particular ſubject, and the king cannot have a *Scire fac.* but where the thing is *in deceptionem Regis*, or *ad gravamen populi*. 10 *Co. Magdalen College's* caſe. The king is called *Sponſus Regni*, and the writ of *ad quod dammum* is, *Ita quod patria non gravaretur*; but if the writ be not brought againſt a publick injury, the king cannot make a private quarrel himſelf; and no *Scire facias* lies to repeal a patent but in two caſes. 1. A *Scire fac.* to repeal a prior patent is always at the ſuit of a ſubject, 2 *E.* 3. 7. *b. Hill.* 16 *E.* 3. *Fitz. Grant.* 53. the caſe of the burgeſſes of *Wells*, 17 *E.* 3. *Dyer* 269. *a. pl.* 18. Lands held of the biſhop of *Winton* were conveyed to the king by covin to make the biſhop loſe his ſeigniory, and the king *ſede vacante* granted them to the brothers *Carmelites*; and this grant was repealed by *Scire fac. Mich.* 21 *E.* 3. 47. *a. pl.* 68. and in the prince's caſe, 8 *Co.* the king brought the *Scire fac.* But the king there had an intereſt, and the prince

prince could not have thoſe lands without the king by ſeiſure. 2. Here it doth not appear to the court that the ladies ever petitioned to the king to have any ſuch writ of *Scire fac.* *Paſch.* 27 *Eliz.* Sir *Henry Nevil* in chancery brought a *Scire fac.* to repeal a patent, and the writ was *unde nobis ſupplicavit.*

Object. The king may maintain this *Scire fac.* becauſe it is *in deceptionem Dom. Regis.*

* *Reſp.* Admit that it is, yet no deceipt will be ſufficient ground for any ſuch writ, if it be not to his damage, or to the damage of his people. * P. 156.

2. The king here is not deceived, becauſe he recites the will, and yet goes contrary to it, which is according to his prerogative; and there is a difference where the king takes notice of the eſtate of the teſtator, and where he hath not notice, but only by the ſuggeſtion of the party.

To the ſecond point. Such *Scire facias* doth not lie at the ſuit of a ſubject, for two reaſons. 1. Becauſe although the king may bring a *Scire facias* in chancery to repeal a patent; yet when a ſubject repeals a patent of another, not upon privity but grievance, there it ought to be repealed in parliament. *Hill.* 16 *E.* 3. *Fitzh. Brief.* 651. *Mich.* 21 *E.* 3. 46. *b. pl.* 65. It ought to be grounded on matter of record, and not upon ſuggeſtion of matter of fact only. If the king grants two patents of the ſame thing, the ſecond patentee cannot have a *Scire facias* againſt the firſt. *Mich.* 7 *E.* 4. 22. *b.* by *Cateſby*, *Dyer* 176, 277. *a. pl.* 54. Where the title of a ſubject appears upon record, there he may have a *Scire facias*, otherwiſe not. 11 *H.* 4. 67. *Fitzh. Scire fac.* 70. 12 *R.* 2. *Fitzh. Forfeiture* 20. 42 *Aſſiſe, pl.* 25. *Fitzh. Scire fac.* 133. *Paſch.* 49 *E.* 3. 11. *Fitz. Traverſe* 19.

To the third point. A *Scire facias* doth not lie to repeal part of a patent. Letters patent may be void in part, and good in part, but they cannot be repealed in part; 1. Becauſe the record of the patent is intire. 2. The form of the entry of the judgment in a *Scire facias* to repeal a patent, is *quod literæ Patentes vacentur*, and not part of them. *Dyer* 197. In the prince's caſe they are repealed *quoad Maneria, &c.* but it doth not appear there were other lands. And there is a difference between a *Scire facias* and a *Quo Warranto*, for a *Quo Warranto* may be good for part, and ill for another part, becauſe the record is not to be touched by it; but upon a *Scire facias* the record is to

be cancelled. 5 *R.* 2. *Rot. Parliamenti* 89. the caſe of *Layſteffe*. Reverſal of records in part, *Cro. Jac.* 303. *King* verſus *Marborough*, and *Croker* in *Ejectment* againſt an *Infant* and others, reverſed againſt all. *Hill.* 1653. *B. R. Symonds* verſus *Bockle*.

* P. 157. * *Object. Engliſh*'s caſe. Where a fine is reverſed *quoad* an infant, and good for the other, and *F. N. B.* 98. *b.* Fine of lands in ancient demeſne, and at common law, reverſed as to the lands in ancient demeſne, and ſtood as to the others.

Reſp. Upon the *Book of Entries* appears a rational difference; for if a fine be reverſed, generally the writ iſſues to the *Cuſtos Brevium* to cancel the fine. *Coke*'s *Entries* 252. *Gage*'s caſe. *Raſtal*'s *Entries* 278. *a.* But when there is a reverſal as to part, there is no ſuch writ. *Coke*'s *Entries* 257. *b. Peirs* and *Parmiter*'s caſe. So a fine may be reverſed in part, but not cancelled in part; And as to the caſe of ancient demeſne the fine may be reverſed by writ of deceipt; but the judgment is only *quod Dominus rehabeat Curiam ſuam. Raſtal*'s *Entries* 100. *b.* 7 *H.* 4. 44. Counteſs of *Kent*'s caſe. In caſe of an obligation for performance of covenants, the obligation may be good for part, and not good for the other part; but the obligation cannot be cancelled for part, and ſtand good for another part; and here the judgment ought to be *quod Literæ Patentes cancellentur*. There are precedents in point, *Paſch.* 27 *Eliz. Privit* verſus *Ward*. In a *Scire facias* to reverſe a patent for a walk in *Cranburn* chaſe; the judgment ought to be given in *B. R.* when the record is brought there to try the iſſue, but judgment was not given. 28 *Eliz.* The counteſs of *Bath* brought a *Scire facias* to repeal a patent for a market; *Vide* ſuch a *Scire facias*, *Mich.* 11 *H.* 4. 5. *pl.* 13.

Object. Then all the patent is to be repealed if any part be defective.

Reſp. It cannot be repealed upon this writ. 2. Then the whole corporation is diſſolved, and all the revenue returns to the defendant.

To the fourth point. This patent is good in the whole, becauſe although the king takes notice of the will of *Robert*, yet he is not tied to purſue thoſe rules in the erection of the college preſcribed in the ſaid will, becauſe a corporation is a creature of the king. 11 *H.* 7. 27. *b.* and 28. 21 *E.* 4. 7. *a.* by *Choke*. 2. *Ab inconvenienti*, if any variance will deſtroy corporations, *Sutton*'s hoſpital and the ſchool of

of *Sevenoke* in *Kent*, and many others would be deſtroyed. 3. I will go over the deſire of this writ of *Scire facias*.

* *To the fifth point.* It is not fit to repeal this patent at this time, becauſe the court will not repeal the patent without calling the guardians and aſſiſtants of the hoſpital; and here they are not parties. *Keilway* 194. Sir *John Savage*'s caſe. * P. 158.

Maynard ſerjeant *contra*, and it was adjourned. *See after* 177.

Jemot *verſus* Cooley. *See before* 135.

IN ejectment of the demiſe of ſir *Ralph Bovey*. Upon Not guilty the jury found a ſpecial verdict. *Francis Drake* ſeiſed in fee of the land in queſtion, in conſideration of 6000*l.* grants a rent-charge of 420*l.* *per annum* to ſir *Ralph Bovey* and his heirs, and in the deed of grant is this clauſe; *And the ſaid* Drake *doth covenant and grant to the ſaid ſir* Ralph Bovey, *that if the rent be arrear above twenty days after any day of payment, that then the ſaid ſir* Ralph Bovey *and his heirs*, &c. *may enter into the lands and receive the profits until he ſhall be ſatisfied of the arrears; the rent is behind, and* Bovey *enters and makes a leaſe to the plaintiff; and if* Bovey *hath ſuch an intereſt as he may maintain an ejectment*, was the queſtion. Eſtate. 3 Danv. Abr. 163. p. 4. 1 Sid. 223, 262, 344. 1 Lev. 170. 1 Saund. 112. 2 Vent. 193. 1 Keb. 784, 915. 1 Keb. 20, 184, 270, 295. 3 Keb. 6.

Morton juſtice for the plaintiff. Here an inheritance paſſes, and not a chattel, and the rent is the principal, and the power to enter is a farther remedy, *Littleton ſect.* 327. it is more than a penalty. For *Cro. Jac.* 511. *Hare* verſus *Havergil.* This grant is in the nature of a common aſſurance, and therefore ought to be favoured; and it is of more antiquity than a common recovery. 19 *E.* 3. *Fitz. Bar.* 280. 13 *R.* 2. *Fitz. Done* 10. Authority in point, *Hill.* 13 *Jac. C. B. Rot.* 868. *Brown* verſus *Hagger*, cited in *Price* and *Vaughan*'s caſe; and *Trin.* 14 *Car.* 2. *Rot.* 2511. *C. B. Eger* verſus *Malin.* Ejectment upon a leaſe of the lord *Byron*. Special verdict was found; ſir *John Byron* ſeiſed in fee, by indenture grants a rent-charge for life to commence after the death of the grantor; and if the rent be arrear, that the grantee may enter and take the profits without account till the rent and arrears ſhall be paid; the rent was arrear, and the grantee enters and makes a leaſe to the plaintiff.

* And by *Bridgman* chief juſtice, There is not more difference betwixt a grant and feoffment, than betwixt one * P. 159.

egg and another; and the juſtices agreed for the plaintiff there, beſides *Brown* juſtice.

Wyndham juſtice accordingly. Here the thing granted is only a power, and not the term it ſelf, and it is as a diſtreſs; but this power produces a real effect, when the grantee hath entered he hath only a pernancy of the profits; for he cannot cut trees, or pull down houſes, and if he doth, treſpaſs lies againſt him, as againſt him who abuſes a diſtreſs; this power goes to the heir, but the inheritance ſubſequent goes to the executors, and follows the arrears of rent.

Twiſden juſtice, and *Kelyng* chief juſtice accordingly; and judgment was given for the plaintiff.

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* P. 160. * Term. Hill. 18 & 19 Car. 2. B. R.

Rymes *verſus* Baker.

Covenant. 2 Keb. 139.

IN covenant. The plaintiff counts that he demiſed to the defendant certain land for thirteen years, to pay to him 40*l.* quarterly, and doth not ſay *annuatim*. The defendant pleads *Non eſt factum*, and found for the plaintiff, and after plea pleaded, the plaintiff amended his declaration, and inſerted the word *annuatim*.

And *Powis* moved for the defendant, that it ſhould be examined.

But by *Kelyng* chief juſtice, and *Wyndham* juſtice, The addition of *annuatim* is no more than what was implied before.

And by *Twiſden* juſtice. The defendant ought to have demanded oyer of the deed, and now he having pleaded *Non eſt factum* he is not prejudiced by the amendment; and therefore let the amendment ſtand.

Preſentment. 2 Keb. 130.

Ayres was preſented at the leet for digging cony-boroughs, and breaking the ſoil in the waſte.

Winnington moved to quaſh it, becauſe it is not *ad Commune nocumentum*. *Cro. Jac.* 156. *Leiceſter Foreſt*'s caſe. 27 *Aſſ. pl.* 6.

Kelyng chief juſtice. A leet cannot amerce for things done to the damage of the lord; and the preſentment was quaſhed.

Term.

* Term. Paſch. 19 Car. 2. B. R. * P. 161.

Bilton *verſus* Johnſon and others.

TRESPASS and falſe impriſonment in *London*. The defendant pleads that *J. S.* ſued forth a writ of *Latitat* the laſt day of *Trinity* term, directed to the ſheriff of *R.* and by virtue of that the ſheriff of the ſaid county made a warrant to the defendant, and he upon that took the plaintiff, which is the ſame impriſonment, *abſq; hoc*, that he is guilty in *London*, *vel aliter vel alio modo*. And the plaintiff replies, that the ſaid writ was truly proſecuted after the impriſonment, *(viz.)* the 9*th* of *Auguſt*. And upon this the defendant demurs; and adjudged for the plaintiff, becauſe although the *Teſte* of the writ is upon record, and the plaintiff cannot aver againſt it; yet here great inconveniencies will be, if the plaintiff cannot ſet forth the very time of the purchaſe of the writ, and the relation of the *Teſte* is only to prevent fraud, and not juſtify a *Tort*; and judgment was given for the plaintiff.

Falſe Impriſonment. 2 Keb. 173, 198. Sid. 271. Baily *ver.* Bunning.

The ſheriff returns a reſcous againſt *Syms*, and others; and the return is, that *A.* being in cuſtody of my bailiffs, the defendant reſcued him out of the cuſtody of the bailiffs; and *Stroud* moved to quaſh it, becauſe it ought to be out of the cuſtody of the ſheriff.

Reſcous. 1 Lev. 214.

Twiſden juſtice. This hath been ruled both ways, for it is good, *e cuſtodia mea ſecundum veritatem Legis*, and good *e cuſtodia Ballivi mei ſecundum veritatem facti*; And if an action of the caſe be brought for the reſcous, it ought to be, that he returned the priſoner being *in cuſtodia Ballivi*; but the other juſtices ruled that it ought to be *ex cuſtodia Vicecomitis*, and upon that the return was quaſhed.

Hill. 39 H. 6. 40. b. pl. 4.

Term.

Knight *verſus* Buckley.

Debt.
2 Danv. Abr. 485. p. 9.
1 Lev. 215.
1 Sid. 338.
2 Keb. 260, 277.

DEBT for rent by the aſſignee of a reverſion. The defendant pleads, That before any rent arrear he had aſſigned to another. The plaintiff demurs; and adjudged for the plaintiff, by *Kelyng* and *Wyndham*, contrary to the opinion of *Twiſden*; becauſe the defendant doth not alledge that he gave notice to the reverſioner of this aſſignment. *Vide Cro. Eliz.* 22. *Serjeant* and *Gibſon*'s caſe.

This term proclamation was made in court for the county of *Middleſex*, for the rates and prices of hoſtlers, *viz.* hay for a night and day for one horſe 9*d.* with litter; hay for one day 4*d.* For one horſe without hay 2*d.* oats 8*d.* by the peck, and not more.

Snow *verſus* Cutler. *See before.*

Deviſe.
2 Danv. Abr. 520. p. 16.
Eq. Ab. 188, p. 10.
1 Lev. 135.
1 Sid. 153.
1 Keb. 567, 752, 800, 851.
2 Keb. 11, 145, 296.

IN ejectment of the demiſe of *Henry Chomeley* of lands in *Hackney*. A ſpecial verdict found, that *Sarah* the wife ſeiſed in fee of a copyhold, ſurrenders to the uſe of her ſelf, and *Robert Jaques* her huſband, and the heirs of the huſband; the huſband after ſurrenders to the uſe of his will, and makes his will, and by this deviſes his land in theſe words; *My lands in* Hackney *which were my wife's, and now her's for life, I give to the heirs of the body of my ſaid wife, if that he or they live till fourteen years of age; and for want of ſuch heirs, then to* William Jacob *and his heirs.* 10 *Auguſt*, 1 *Car.* 1. *Robert Jaques* dies, *Sarah* ſurvives and marries *Henry Chomeley*, by whom ſhe had iſſue the leſſor of the plaintiff. *Henry Chomeley* ſuffers a recovery, 20 *Febr.* 15 *Car.* 2. *Sarah* dies, and the leſſor of the plaintiff enters and the heir of *Robert Jaques*, the deviſor, enters upon him.

* P. 163. * The points were two, *viz.* 1. What paſſes by the will. 2. What operation the recovery hath.

Moreton

Moreton juſtice. 1*ſt*, If this deviſe of the remainder in fee be good to the heirs of the body of the wife, by way of executory deviſe. 2. If the recovery be a good bar to the executory deviſe.

As to the ſecond point he did not meddle; but as to the firſt, he held it is a void deviſe. Conveyances at common law are good directions for wills. 1 *Co.* 85. *Perkins* 97. There ought to be a deviſee, as well as a deviſor *in rerum natura* and *in Eſſe* at the time of the deviſe. 2 *H.* 7. 13. 9 *H.* 6. 23. *Moor* 637. To an infant *in ventre ſa mere*. *Dyer* 303. *Trin.* 16 *Car.* 2. *C. B. Woodley* verſus *Nightingale*. There was a good executory deviſe, but not better for being a ſurrender. *Cro. Eliz.* *Clamp*'s caſe.

Object. It paſſes by way of reverſion, and the inheritance deſcends in the mean time.

Reſp. It cannot, becauſe there is a remainder over. 9 *H.* 6. A uſe to a monk, the remainder to *J. S.* and his heirs, the remainder veſts immediately, and cannot paſs as an executory deviſe, becauſe there ought to be ſuch manifeſt intent, and not by averment. *Shelton* verſus *Bine*, *Paſch.* 17 *Car.* 2. A deviſe of land to one after the death of *J. S.* is a preſent deviſe; and a deviſe to the firſt ſon of *J. S.* when he is born, is void without an eſtate of freehold precedent.

Wyndham juſtice accords with *Moreton* juſtice. The queſtions are:

1. If the deviſe to the heirs of *J. S.* (he being then alive) be good?

2. The feme here having an eſtate for life, if this alter the caſe?

3. If the recital here alter the caſe?

4. If the words *(viz.) If he live to fourteen years*, alter the caſe?

As to the 1*ſt*, It is a ground, that judges ought to keep within bounds: and it is ſaid, that if *Matthew Manning*'s caſe had been to be adjudged now, it would have been otherwiſe determined. A deviſe to the heirs of *J. S.* he being alive, is a void deviſe. Power to make leaſes to one, two or three perſons, he cannot make a leaſe for the life of the firſt ſon of *J. S.* becauſe the perſon ought to be *in Eſſe*, *per Noy* attorney general.

As to the 2*d*. The eſtate for life of the wife doth not alter the caſe. 40 *E.* 3. 9. *Beverly*'s caſe. A leaſe for the life of *A.* remainder to his right heirs, *A.* hath an eſtate in fee preſently.

* To the 3*d*. The recital doth not alter the caſe, be- * P. 164.
cauſe in no caſe where there is a preſent deviſe there ſhall not

not be a contingent executory deviſe; *Wild's* caſe expreſs in the point.

Object. Deviſe to an infant *in ventre ſa mere* is good.

Reſp. The greater opinion is, that ſuch deviſe is void; yet an infant *in ventre ſa mere* is *in Eſſe*, and may be vouched; the earl of *Bedford's* caſe.

To the *4th.* It is a contingent upon a contingent.

Twiſden juſtice *contra.* It is a good deviſe to the heirs of *Sarah*; and he took a difference between acts executed, and deviſes, becauſe a deviſe may be *in futuro*; as a deviſe to *J. S.* when he marries ſuch a one, there no eſtate veſts in him till marriage. 11 *H.* 7. 17. As to the deviſe to an infant *in ventre ſa mere*, 11 *H.* 7. 13. it is frequent. *Moor* 177. *Dyer* 342. This is a contingent purſuant to the courſe of nature.

To the 2*d* point of the recovery it works nothing, becauſe copyhold and a recovery of a copyhold doth not dock the remainder without cuſtom.

Kelyng chief juſtice agreed with *Twiſden*, and ſo the court was divided.

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* P. 165. * Term. Hill. 19 & 20 Car. 2. B. R.

John Pemble *verſus* Sterne.

Intr. Hill. 16 & 17 Car. 2. Rot. 1521.

Eſtate.
2 Danv. Ab. 752. p. 5.
3 Danv. Abr. 244. p. 2.
1 Lev. 212.
1 Sid. 316, 416.
2 Keb. 213, 230, 325, 440, 460, 464, 484, 525.

ON an ejectment a ſpecial verdict found, that the lands in queſtion were parcel of the inheritance of the archbiſhop of *York*, and uſually and anciently demiſed by leaſe. For 12 *Decemb.* 1604. the archbiſhop of *York* on ſurrender of a former leaſe demiſes this to *Robert Newil* for 21 years under the old rent. *Newil* ſurrenders this in the year 1630. to *Harſnet* archbiſhop, *ea intentione* to preſerve this land for the maintenance of his ſucceſſor; the archbiſhop enters, and dies 1631. after whoſe death *Neal* was made archbiſhop,

archbiſhop, who died in 1641. and *William* was made archbiſhop, during all which time the land was in the hands of the archbiſhops. In 1642. an ordinance was made for ſequeſtering the lands of the church; and after *(viz.)* in 1646. there was a ſale of the lands of the church; *Williams* dies 1646. and after *(viz.)* in 1660. *Fruyn* was made archbiſhop, who made a leaſe for 21 years to the leſſor of the plaintiff; *Fruyn* dies, and *Stern* is made archbiſhop, who demiſes the land to the defendant.

The queſtion is, If this leaſe made by *Fruyn* be good?

Moreton juſtice for the defendant. Becauſe the verdict is inſufficient and void: 1. Becauſe here is a demiſe of divers things, and the verdict finds only for part, and nothing for the reſidue. 30 *E.* 3. 33. 1 *Inſt.* 227. *a.* 2. The jury finds that the lands in queſtion are part of the inheritance of the church of *York*, and commonly demiſed, and doth not ſay for what time, which ought to be for the greater part of 20 years.

As to the matter in law, the leaſe is not good by 32 *H.* 8. And to this point it is to be conſidered, what the law was before this ſtatute: The biſhop could not by himſelf do any prejudice to the church, he could not diſclaim, releaſe, grant an annuity. 1 *Inſt.* 102. He might grant the inheritance with * the confirmation of the dean and chapter; and before the third council of *Nice* 710. without ſuch conſent, receipt of rent by the ſucceſſor would bind him. In this ſtatute the proviſo is conſiderable; the ſtatute doth not mention biſhops, and the greater miſchief is of tenants in tail; and this ſtatute aimed at the benefit of the ſucceſſor; leaſes ought to be in the form there preſcribed. *Bridgman*'s *Rep.* the biſhop of *Chicheſter* and *Freedland*'s caſe. Here was 32 years without any demiſe, but kept in demeſne; and it ought to be demiſed within eleven years before. 1 *Inſt.* 44. *Cro. Eliz.* 707. * P. 166.

If the temporalities continue twenty years in the hands of the king, this doth not hinder the demiſe, becauſe the king cannot charge the church.

A biſhop is not compellable to demiſe his lands, no more than another lord of copyhold. If tenant in tail make a leaſe for 21 years, which expires, and then the land continues twelve years undemiſed, and tenant in tail dies, his iſſue cannot demiſe this land by the ſtatute.

Wyndham juſtice for the defendant. He took the like exception to the verdict which *Moreton* took; and as to the matter in law, this part of the proviſo ought to be as ſtrictly obſerved as any other part of it. Sequeſtration doth

According to this opinion is *Palmer*'s Rep. 176. the Biſhop of *Oxford*'s caſe.

doth not hinder the demiſe; but if it be in the king's hands it is a great doubt, and this ſtatute being an enabling law, implies a ſtrong negative, that it ſhall not be otherwiſe, being an introductive law. For authorities, the caſe of *Cro. Eliz.* is a ſtronger caſe, *Cro. Eliz.* 708. *Mallet* verſus *Mallet*, and ſir *John Marvin*'s caſe in *Harpur*'s *Rep.*

Twiſden juſtice for the plaintiff. As to the exception to the verdict, the firſt he allowed, but not the latter. As to the matter in law; in this ſtatute there is an enacting part and a reſtrictive part; this caſe is of a new nature, and never brought in queſtion before.

Here it is to be inquired, 1. If land be kept in the hands of the biſhop, if it may be after demiſed by the ſucceſſor?

2. If the leſſee ſurrenders, and the biſhop keeps the land?

3. It was demiſed here in 1604. and *Octob.* 1630. ſurrendered to *Harſnet*, and it was not for eleven years together in the hands of any biſhop.

The ſtatute extends directly, and not obliquely to biſhops. Here is a ſhell and a kernel, words and meaning. Space, and term of twenty years is not all one here. The preamble is the key for reformation thereof, *&c.* which implies a miſchief before. They were to pay firſt-fruits, and
* P. 167. yet they could not * raiſe money without the chapter, who would have money alſo to conſent. The meaning ariſes from the time of making the ſtatute, where many lands were which never were demiſed, as palaces. But thoſe which were then demiſed, and had gained a cuſtomable rent, the ſucceſſor could not deveſt this power after by not demiſing it. The act doth not force biſhops to keep lands in their hands. A biſhop makes a leaſe of a reverſion of a copyhold, it is a demiſe within this ſtatute. 6 *Co.* 39. *Moor* 719. A demiſe for years of tithes is good within this ſtatute, *Denton*'s caſe. As to *Mallet* and *Mallet*'s caſe, the chief giſt of that caſe was concerning the comprize of lands by the name of a manor. Whatſoever comes within the body of the act ought to be averred, but not when it comes in by the proviſo. *Plowd.* 376. As to *Scrog*'s caſe, *Cro. Eliz.* that makes nothing to this caſe. And as to the caſe in *Harpur*'s *Reports*, it is only, *Nota, dictum fuit per Catlin* and his companions.

As to the 2*d.* If a biſhop make a leaſe for years, and the leſſee ſurrenders, and the biſhop keeps the land in his hands, as long as the leaſe hath exiſtence, the ſucceſſor notwithſtanding may demiſe the land. 1. Becauſe the leaſe hath exiſtence to ſome purpoſe, 9 *E.* 4. 18. and the lord *Abergavenny*'s

Abergavenny's and *Davenport*'s caſe, 8 *Co.* 140. *Litt. ſect.* 636. and this caſe is not like the caſe of a fine.

If the words *(moſt commonly)* extend to eleven years, theſe miſchiefs will enſue on ſuch conſtruction: In caſe of tenant in tail he takes a wife and dies, the feme lives above eleven years, and hath this land in her hands: So of an infant tenant in tail. *Dyer* 271. and *Ninian Merwile*'s caſe. 26 *Eliz. Haines* verſus *Holland*, *Shute*'s *Rep. Cox* biſhop of *Ely*'s caſe. No leaſe queſtioned, although the biſhoprick was in the hands of the queen for twenty years.

Kelyng chief juſtice for the plaintiff. He agreed that the firſt exception to the verdict is good; but as to the point in law he concluded for the plaintiff. A biſhop makes a leaſe for one and twenty years of lands never demiſed, and dies, the king keeps it in his hands. *Dyer* 261. As to the twenty years before this leaſe made, ſeventeen years of it the land was in the hands of a diſſeiſor. Statutes are to be conſtrued according to the deſign of the makers of them. *Plowd.* 106. *Fulmerſton Sherrard*, *Magna Charta*, *cap.* 11. *F. Br.* 661. *Marlb. cap.* 4. Literal interpretations are not neceſſary. *Grotius de Jure Belli & Pacis. Page* 30. The deſign of this ſtatute was for the benefit of the leſſees in one degree, and for the * biſhop in another; it was to avoid long leaſes, and in reverſion, and the ancient rent ought to be reſerved. If this ſtatute ſhall be conſtrued for the defendant theſe inconveniencies will enſue. * P. 168.

1. A leaſe expires, and then the biſhop is diſſeiſed for twelve years, then he recovers. The drift of the ſtatute was only to reſtrain the demiſes of ancient palaces and demeſnes, and not other things.

2. It ſhall be in the power of a biſhop to repeal this ſtatute.

In the proviſo are two clauſes of qualification, *viz.* Let to farm. 2. Or occupied by farmers by the ſpace of twenty years; the words *by the ſpace of twenty years* extend only to the ſecond part of the disjunctive, and not to *let to farm*. And this hath been the expoſition of this ſtatute in the caſe of the biſhops of *Wincheſter* and *London* for their houſes lately. And as to the caſes of *Mallet* and *Mallet*, and *Scrog*'s caſe, they are not to the purpoſe; and ſo he concluded for the plaintiff. And for that the court was divided, no judgment was given. But the cauſe was adjourned. *Et ſic pendet.*

Term.

Barker *verſus* Durrant

Award.

DEBT upon an obligation to perform an arbitrament. Upon no arbitrament pleaded, the plaintiff replies and ſets forth the award, which conſiſted of two parts (amongſt others) To which exception was taken *(viz.)* 1. That the defendant ſhall make a releaſe to the plaintiff until the time of the arbitrament, and then the bond of the ſubmiſſion is diſcharged. But it was not allowed, becauſe divers things are to be done together, and if all had been done the releaſe ſhall be no prejudice; and ſo it differs from the caſe where money is to be paid after the releaſe is to be given. 2. The award was in part of ſatisfaction, which is not good. *Mich.* 45 *E.* 3. 16. *a. pl.* 18. and *Trin.* 1653. *B. R. Penros* verſus *Tubb. Sed non allocatur*, becauſe it is *tant. exiſtent' partem reddit'us*, which is only a deſcription when he will pay it, and not by way of diſcharge of rent in controverſy: And judgment was for the plaintiff.

Smedly *verſus* Heap.

Words.
1 Lev. 250.
2 Keb. 404.

THE plaintiff declares, that he is a mercer, and the defendant ſaid to him theſe words, *viz. Thou art a cheating knave and a rogue.* On Not guilty, verdict for the plaintiff.

And *Bigland* moved in arreſt of judgment, becauſe there was not any communication by the defendant of the trade of the plaintiff: And therefore ſtay, *&c.*

* Taylor *verſus* Brown.

Prohibition.
1 Vent. 5.
Clift's Entries 13.

A PROHIBITION was granted to the eccleſiaſtical court, becauſe they refuſed to deliver a copy of the articles; and the rule was, that a prohibition go until they deliver ſuch a copy, and the writ of prohibition was abſolute without a *quouſque.*

And

And *Linley* moved for a consultation; but the court would not grant a consultation, but a *Supersedeas*; and further resolved that the statute of 2 *H.* 5. *cap.* 3. extends where the proceeding in the ecclesiastical court is *ex Officio*, as well as betwixt party and party; and the report of *Moor* 756. is ill reported; for *Cro. Jac.* 37. is contrary, and that a prohibition lies for not delivering the copy of a libel in such case.

Information against *Buckworth* and others for perjury, in ejectment. The defendants justify; upon Not guilty, and now upon evidence to prove the perjury, one was produced to prove what one, that is since dead, swore upon the first trial. Perjury. 1 Sid. 377. 2 Keb. 403.

And by *Kelyng* chief justice, It shall not be allowed, because betwixt other parties.

But *Twisden* and *Morton contra*. And it was allowed.

Ward *versus* Culppeper.

REPLEVIN. The defendant avows for a rent-charge. The plaintiff pleads in bar *Non concessit*; and upon this issue is taken according to the statute of 17 *Car.* 2. *c.* 7. And the jury found the value of the cattle, but not the arrears. Inquiry. 1 Vent. 40. 1 Lev. 255. 1 Sid. 380. 2 Keb. 409, 431, 536.

And *Winnington* moved in arrest of judgment upon the said verdict; because perhaps there are only 20*l.* arrear, and the value of the cattle are 50*l.* And the court ruled that judgment shall not be entered upon this finding, but the avowant may have judgment at common law, if he will, and then the plaintiff is put to a second deliverance.

* Rumsey *versus* Rawson. * P. 171.

IN replevin. The defendant avows as a commoner for taking goods damage-feasant *in loco in quo*, &c. The plaintiff pleads in bar of the said avowry, that the parson of *Dale* is seised of such glebe land, and that he had common *in loco in quo*, &c. for two hundred sheep levant and couchant upon the same glebe land, and that the plaintiff by the licence of the said parson put in his cattle, and issue is taken upon the levant and couchant, and found for the plaintiff. Common. 1 Vent. 18, 25. 2 Keb. 410, 493, 594.

And serjeant *Maynard* moved in arrest of judgment for the avowant, because licence cannot be given by a commoner to put in the cattle of a stranger, and here the plaintiff

plaintiff was only a treſpaſſer upon the parſon, and ſuch licence cannot be without deed, 2 *Cro.* 574. *Monk* verſus *Butler:* And ſtay until, *&c.*

Return.
1 Sid. 407.
2 Keb. 410, 464.
Vide ante, fo. 81.
Long *verſus* Emot, ejectment in B. R. of lands in Lancaſhire. See after fo. 206. Draper and Balie's.

Needham *verſus* Bennet.

UPON a judgment in *B. R.* a *Fieri facias* iſſued (after a *Teſtatum*) to the ſheriff of *Cheſter*, who returns *quod fieri fecit* the goods, but that they remain in his hands *pro defectu Emptor'*, and upon that a *Venditioni exponas* iſſues to him, of the which he doth make no return, nor gives ſatisfaction to the plaintiff; and upon this he moves for an attachment.

And *Williams* moved to ſtay the attachment, becauſe a *Fieri Facias* cannot iſſue out of this court to the county palatine of *Cheſter*, and made a difference betwixt a judgment originally given in this court, and when a judgment is removed hither by writ of error; in the ſecond caſe it lies, but not in the firſt. *Mich.* 21 *H.* 7. 33. *pl.* 32. Judgment in *Callais* or *Wales* cannot be here reformed, becauſe not parcel of the realm, otherwiſe of *Lancaſter*; *Sed non allocatur*, and an attachment was granted.

* P. 172.

* Danby *verſus* Palmes.

Eſtrepement.
1 Sid. 369.
2 Keb. 376, 381, 413, 580.

A WRIT of error to reverſe a judgment given in *C. B.* in a writ of partition upon a *Nihil dicit*, of divers manors, and view of frankpledge, and free warren, and other things of great value. Upon *In nullo eſt erratum* pleaded, the counſel for the plaintiff in the writ of error aſſigned divers errors, ſome in form, and others in the ſubſtance of the proceedings.

And as to the form *Coleman* ſhews, 1. The executory judgment is *quod partitio fact.* and not *fit*, or *fiat*, and ſo not ſenſe. 2. The precept to the ſheriff after the executory judgment is *quod per ſacramentum proborum hominum in Comitatu, &c.* and doth not ſay, *de Comitatu.* 3. Here is a diſcontinuance, becauſe there is not any continuance for the tenant *per idem dies*, when the partition ſhall be made.

The errors in ſubſtance are: 1. No mention is of the view of frankpledge, and yet in the writ is mention of the view of frankpledge, not as appurtenant to the manors, but diſtinct; and here is not any mention of it in the partition; and *cum pertinentiis* ſhall not ſupply it. 2. The ſheriff returns *unam medietatem eorundem, (viz.* the premiſſes before

before) to be delivered to *Danby*, *viz.* ſuch manors *per parcella medietatis ſuæ*, and other manors to *Palmes*, and then again, *alteram medietatem* to *Danby* again, and ſo *Danby* hath two moieties. 3. The ſheriff delivers *quartam partem* of ſuch a thing, and doth not ſay *per metas & bundas*; and if the parties have a fourth part, then the writ ought to be ſo. 4. The ſheriff divides the rents without ſhewing which *(viz.)* copy or free, or upon leaſes for lives, years or at will. 5. The ſheriff delivers to *Danby* and *Margaret* his wife, whereas it appears upon the writ, that *Danby* was only ſeiſed in the right of his wife, and now by this delivery he hath an intereſt in his own right. *Sed non allocatur per Curiam.* 6. By *Offly* upon the return of the ſheriff he doth not conclude that thoſe are all the lands comprehended within the writ to him directed, as it is in *Co. Entr.* 412. *a. pl.* 2. and by *Weſton.* 7. The demand is of 400 acres of wood, and no mention of that in the partition, but only of a park *una cum omnibus arboribus eidem pertinent'*, which is not the wood here. 8. Divers things are delivered in the partition, which are not demanded or mentioned in the writ, and yet the writ of * partition lies of them, *viz.* paſture for ſix beaſts, *Shopas*, *&c.* 9. The ſheriff delivers three acres of meadow lying in the meadow of *Middlefield*, excepting *duobus rodis*, and there is not any diſpoſal of thoſe two rods after or before. 10. The writ is that the ſheriff ſhall go to the advowſon, which cannot be, becauſe it is incorporeal. *Et adjournatur.*

* P. 173.

Criſpe *verſus* Mayor and Commonalty of Berwick.

Trin. 20 Car. 2.

ON covenant upon an indenture the plaintiff counts that the defendants at *York* demiſed to him certain meſſuages in *Berwick*, for years; and that they covenanted that they had power to demiſe them, and that the plaintiff ſhould enjoy them quietly, and aſſigns a breach, that ſuch a one entered upon him and ejected him out of the ſaid meſſuages. The defendants plead that the ſtrangers did not enter upon the poſſeſſion of the plaintiff; and upon this iſſue is joined, and a ſuggeſtion is made upon the roll, that the king's writ doth not run in *Berwick*, and therefore that the *Venire Fac.* ſhall be of the next vill to *Berwick*, which is *Belfort*; and upon this a *Venire Fac.* is directed to the ſheriff of *Northumberland* to make to come twelve out of *Belfort* to try this iſſue, and the jury found for the plaintiff.

Trial. 1 Lev. 252. 1 Vent. 58, 90. 1 Sid. 381, 462. 2 Keb. 391, 397, 414, 602, 676. 1 Mod. 36.

And

And now *Stote* for the defendant moved in arreſt of judgment, that this trial is not good, becauſe *Berwick* being out of the realm, the trial ought to be where the action is brought, *viz.* at *York*, and not at *Belfort*. And there is a difference betwixt a county palatine, which is part of the realm, as *Lancaſter*, *Cheſter* and *Durham*, and *Wales*, which is not part of the realm, and *Berwick* here, *Fitzh. Trial.* 4. *Kelw.* 202. *a. pl.* 19. *Mich.* 18 *Eliz. C. B. Chriſtmas*'s caſe. Appeal doth not lie in *B. R.* for the murder of a man in *Berwick*.

Object. There will be failer of juſtice, becauſe the defendants are judges.

Reſp. The law of *England* doth not take conuſance of that which is out of its juriſdiction; and *Berwick* is not part of *England*. 7 *Co. Calvin*'s caſe, 23. *b.* And by the ſame reaſon that ſuch trial ſhall be of a thing in *Berwick*, it ſhall be in *Ireland*, *&c.* And the privileges of *Berwick* are confirmed by *Alexander* king of *Scotland*, and 42 *Eliz. C. B. Rot.* 630. *Shepardſon* verſus *Chambers*, In debt upon an obligation conditioned * to pay money in *Berwick*, was tried at *Belfort*, but then the action was laid there.

* P. 174.

Shaſto for the plaintiff. Here would be a failer of juſtice, *Mich.* 19 *H.* 6. 12. *b. pl.* 31. *per Aſkue*, A thing done in *Wales* ſhall at common law be tried in the next county adjoining, and there no mention is made of it, which *Fitzh.* in the abridgment of this caſe mentions *tit. Trial* 4. a more ſtrong caſe of a thing in *Ireland* tried in the county of *Salop*, which is alledged to be the next county to *Ireland*. 2 *Roll.* 597. *pl.* 8. *Barnwel* verſus *Ratcliffe*, and a writ of error lies to *Berwick* or *Callais*, 4 *Inſt.* 282. and there is a like ſuggeſtion for *York*, *Dyer* 279. *b. pl.* 10. *Moor* 581. *pl.* 796. 8 *Co.* 125. *a.* Lands in *Wales* are pleadable here. *Fitzh. tit. Juriſdiction* 34. and *Scotland*, *Br.* 551. and 12 *H.* 4. 16. *pro Normandy*.

Cro. Eliz. 465. Waller verſus Davies.

Wyndham juſtice. It ought to be tried in *York*, where the action is brought as *Co. Dowdale*'s caſe is. And adjourned; and after reſolved for the plaintiff in this point.

This vacation died ſir *Wadham Wyndham* knight, one of the juſtices of the *King*'s *Bench*, and of the county of *Somerſet*, who was a good and prudent man.

Term.

Watſon *verſus* Baker. *Error*, B. R.

IN debt upon an obligation. The condition being that the defendant being parſon of *A.* ſhould reſign upon requeſt. The defendant pleads that he did reſign according to the condition, and found againſt him, and judgment for the plaintiff; and now brought a writ of error becauſe a ſimoniacal condition: But judgment was affirmed, becauſe the condition is good.

Condition.
2 Danv. Abr. 18. p. 1.
1 Sid. 387.
2 Keb. 446.

This term in the place of juſtice *Wyndham* came baron *Rainsford*, who being a baron, before that *Morton* was judge, was now made the third juſtice of this court, and took place of *Morton*.

Salmon *verſus* Smith.

IN debt for rent. The plaintiff counts of a demiſe of four rooms. The defendant pleads, that as to part *Actio non*, becauſe the plaintiff demiſed to him the ſaid four rooms; and alſo another room into which the plaintiff entered before any rent due, and is in poſſeſſion of it. The plaintiff demurs, becauſe the defendant doth not traverſe the demiſe by the plaintiff ſet forth in his count.

Pleading.
1 Lev. 263.
1 Saund. 206.
1 Sid. 405.
2 Keb. 467, 470.

Sanders for the defendant. And he cited *Mich.* 5 *E.* 4. 8. *pl.* 19. where ſuch a caſe is cited without a traverſe. But judgment was given for the plaintiff by the whole court, becauſe the plea doth not anſwer to the count, nor is it *ad idem*, *Mich.* 32 *H.* 6. 3. *b. pl.* 1. and *Mich.* 35 *H.* 6. 38. *a. pl.* 47. and the pleading in the caſe of *Dyer* 32. *b. pl.* 7. is not controverted; and this caſe is reſolved, 1 *Leon.* 43. *Kempton* and *Bellamy*, and ſo are all the precedents.

Sir *John Kelyng*, Chief Juſtice.
Twiſden, *Rainsford* and *Morton*, } Juſtices.

Skinner *verſus* Gunton, Lyon, and others.

Caſe.
1 Danv. Ab. 208. p. 5. 213. p. 3.
1 Vent. 12, 18, 19.
1 Saund. 228.
2 Keb. 473, 476, 497.
3 Keb. 118.

IN an action upon the caſe. The plaintiff declares, that the defendants, with others, conſpired together to arreſt the plaintiff in a grand action in *London*, and took out a plaint in the ſheriffs court there, of 300*l.* with an intent that the plaintiff ſhould not find bail; and upon this the plaintiff was arreſted, and was compelled to continue in priſon twenty days and nights, *ad dammum* of 100*l.* Upon Not guilty, one only was found guilty.

And *Sanders* for the defendant moved in arreſt of judgment. 1. Becauſe the plaintiff doth not ſhew that there was any end or determination of that ſuit, which ought to be ſhewn. 2. It is an action of conſpiracy, which doth not lie againſt one only.

Pemberton for the plaintiff. The complaint is only of an arreſt, and not any other proceeding as joint, &c. And as to the 2*d*, It is only an action upon the caſe. *F. N. B.* 116. *a.* And before the ſtatute *de Conſpiratoribus* made 33 *E.* 1. *page* 89. an action of conſpiracy doth not lie for any thing, beſides for indicting for felony or treaſon; but by this ſtatute it lies for treſpaſs, and ſo againſt one only. *Trin.* 11 *H.* 7. 25. *pl.* 7. And this action is only an action upon the caſe in the nature of a conſpiracy. *Cro. Eliz.* 701. *Marſh* againſt *Vaughan*. And judgment was given by the whole court for the plaintiff.

Apprentice.
2 Keb. 480. Trem. 465.

The town of *Nottingham* impoſe by order of the ſeſſions an apprentice upon one Mr. *Selwin*, and he moved by *Bigland* for a *Certiorari* to remove this order, with an intent

to

* to quaſh it, becauſe the ſtatute of 39 *Eliz. cap.* 2. doth not compel any to take an apprentice. * P. 177.

Kelyng chief juſtice. The validity of this clauſe is to be tried in an action.

Twiſden juſtice. It hath been an opinion, that a man cannot be conſtrained to take an apprentice; but of late time it hath been held otherwiſe.

Kelyng chief juſtice. It was held in king *Charles* the Iſt's, That an apprentice might be impoſed; and ſo it was given in charge by the lord keeper in the ſtar-chamber; and there is no inconvenience, becauſe the maſter may aſſign the apprentice over.

Twiſden juſtice. If the apprentice may be impoſed, it will be hard for merchants in *London*, &c.

Morton juſtice. It was always ruled by *Damport* chief baron, in his circuit, to confirm ſuch orders. *See this caſe before.*

The Caſe of Sackvile *College. See before in* Chancery.

TWISDEN juſtice for the plaintiff. The queſtions in this caſe are three. 1. If theſe grants are repealable, and are void? 2. If this be an apt *Scire facias*, being to repeal part of a patent? 3. If this writ may conclude to the exheredation of the heirs? Scire facias. Antea 154.

As to the firſt. Theſe letters patent to *Edward* earl of *Dorſet*, and his heirs male, are void, and ought to be repealed, and may be repealed though void. *Hill.* 12 *H.* 7. *Kelw.* 19. *a.* by *Keble.* And that theſe letters patent are void, appears, 1. Becauſe they are contrary to the intention of the king. *Hob.* 223. *Anne Needler*'s caſe. 10 *Co.* 110. *b. Vowe*'s caſe. 2. The king cannot deprive the patron of thoſe rights which are appendant to him, which is *jus Patronagii*, & *jus viſitandi*, which are in earl *Robert* and his heirs.

As to the ſecond. This grant may be repealed in part. *Dyer* 276. *b. pl.* 53. becauſe it conſiſts of things of ſeveral natures; and as a patent may be good in part, and naught in part, ſo it may be repealed for part, and ſtand for another part. 9 Co. 28. a. Moor 527. pl. 455. *The caſe of the city of* Wells. 1 And. 230. pl. 246. *Seignor* Cromwell, &c.

As to the third. Here are apt perſons, becauſe the heirs are concerned, becauſe the queſtion is, Who is the dotator? not the executors, but earl *Robert* and his heirs, and the executors are only inſtruments; and the concluſion *ad*

* P. 178. * *damnum* of the heirs doth not vitiate, becauſe the court knows to whoſe damage the patent is.

Object. If this grant ſhall be repealed, the indowments of the hoſpital fail.

Reſp. It was ſubject to repeal originally in the creation.

Hale chief baron *contra.* I premiſe three things, 1. Why I cannot give an opinion to repeal theſe letters patent without grand cauſe. 2. How the caſe ſtands here upon the patent and the will. 3. The reaſons why this writ of *Scire facias* will not lie in this caſe.

As to the firſt. This is the firſt caſe in which clauſes which have a general influence through the whole patent may be repealed. 2. It is a caſe of great moment in particular, becauſe by this repeal the indowment is void; as the caſe of the abby of *Fountain* is; and here no maſter nor other officers may ſubſiſt. 3. Becauſe there is no neceſſity to repeal them, becauſe there are void clauſes, and they may be tried at law; and that is the reaſon that judgment upon an iſſue tried in a *Scire fac.* to repeal a patent in *B. R.* is not there given, but the record is to be returned into this court, which is not in another caſe; and thoſe things are of long continuance, *(viz.)* from 6 *Jac.* for then was the will, and the letters patent were 7 *Car.* 1. and it cannot be known what tranſactions have been paſſed betwixt the king and the heirs of *Richard* earl of *Dorſet* during the time.

As to the ſecond obſervation, upon the patent and the will. 1. No will of *Robert* appears by other record than by recital in theſe letters patent. 2. Although *Richard* ſon and heir of *Robert* was dead at the time of the letters patent, it appears not. 3. Although *de facto Edward* was father of *Richard*, it appears not. 4. It doth not appear that the land, upon which the hoſpital was built, was the indowment of the hoſpital; and if no indowment, no hoſpital. 1. It cannot be underſtood that *Edward* was heir to *Robert*, becauſe here is an averment contrary; and he might be heir male in vulgar appellation. 2. The clauſes are not ſubſtantive and independent clauſes, but have an influence through the whole letters patent; and ſo by the repeal of them the patent ſhall be vitiated, *viz.* the naming and appointment of the ſeveral officers making of rules, conſtitutions and by-laws; and in this particular, this patent is not like to the patent in the Prince's caſe. 3. If here were not derogatory clauſes, *viz.* to create a corporation according to the intention of the will, this will create a right to the heir

* P. 179. * to nominate; but here are derogatory clauſes in it *ſecundum voluntatem,* which ſhall be according to the king's pleaſure,

pleaſure, otherwiſe the name ſhall be altered. 4. The licence to amortize. 5. Thoſe clauſes are not ſimply void, but only voidable, becauſe the king takes notice of the will of earl *Robert*. 6. The grant made to *Edward* to make by-laws, is to him, and the heirs male of his body; but concerning election of members, this is to *Edward*, and the heirs male of the body of *Robert*.

As to the third. Such *Scire facias* lies not in point of form. 1. A patent may be repealed in part, but this ſhall be only in clauſes independent. *Fitzh. Petition* 19. 2. There will be an infinite inconvenience, if by this way part of this patent may be repealed; for by this way a good patent may be made naught, and *e contra*. 3. The king hath ſaid how he will have this corporation qualified, and he is dead, and now we will make other patrons after his death. 4. The king hath ſaid how it ſhall be governed, and not otherwiſe. And here is no neceſſity to repeal this, becauſe if there be void clauſes they may be tried in aſſize, and therefore the writ is ill. 2. It doth not lie for the matter. 1. Becauſe the king takes notice of the clauſes in the will which are deſired to be repealed, and therefore he is not deceived in this grant. In the creation of the hoſpital *ſunt tres Actores fabulæ*. 1. Earl *Robert*. 2. The king, whoſe right is to grant the incorporation. 3. The executors, which ought to indow this hoſpital. 2. The executors are not at any prejudice, becauſe they are not compellable to indow this corporation, if it be not according to the will of earl *Robert*. 3. If the executors have indowed the hoſpital, being ſo created, it is a breach of truſt.

Object. The king cannot diſpoſe of the right of another, and here the founder was earl *Robert*.

Reſp. There is no patronage till the foundation of the hoſpital, and the heir of *Robert* hath not to do with it till the foundation; and the executors do not break the truſt. The lord keeper would adviſe, and ſo it was adjourned.

8 *Maii* 1669. *William Lenthal* was ſworn in the office of marſhal of the King's bench, in the place of ſir *John Lenthal*, his grandfather, who died the laſt vacation.

Stone an attorney of *B. R.* having land within the manor of *Harrow* in the county of *Middleſex, ratione tenuræ*, ought

Privilege. 2 Keb. 477, 486, 491, 508.

* P. 180. This privilege denied Sir *Walter Vane* captain of the guards, which see before. 2 Keb. 309, 321. 1 Sid. 355.

ought * to serve as *Reeve* there, when elected; and he being now elected, prayed a writ of privilege, that he should not be compelled to gather the rents of the lord, and to serve in that office.

Kelyng chief justice. This writ lies here, and is a stronger case than *Prouse*'s case. *Cro. Car.* 389.

Twisden justice. A tenure may be created to such intent to collect the rents of the lord; and *Coke*'s *Entr.* 436. an attorney exempted to be a soldier; so of a clerk of the bank, *Cro. Car.* 8. *Veriable*'s case. 2 *Roll.* 271. *March* 30. *pl.* 65. *Et adjourniatur.*

Sir Andrew Henley *versus* Dr. Burstal.

Case. 1 Danv. Abr. 211. p. 17. 1 Vent. 23, 25. 2 Keb. 486, 494. *Vide* before 135. *Love* versus *Beardmore*, for indicting the plaintiff of a rescue, an action doth not lie.

AN action upon the case for maliciously indicting the plaintiff, being a justice of the peace, for delivering a vagrant out of custody, without examination, contrary to law. Upon Not guilty pleaded, a verdict found for the plaintiff; And *Swain* moved for the defendant in arrest of judgment, that such action doth not lie, because it deters a man from prosecuting for the king.

Maynard serjeant for the plaintiff. Where the indictment is preferred maliciously, and such indictment contains matter of imputation and slander as well as crime; there the action lies; but otherwise where the indictment contains crime without slander, as forcible entry, *&c.* but here is slander as well as crime; and of that opinion was all the court; and judgment was given for the plaintiff.

Price *versus* Crofts and others. Mich. 1657. B. R.

Case

AN action upon the case in nature of a conspiracy, for indicting the plaintiff of barretry; one of the defendants is only found guilty.

And *Baldwin* moved in arrest of judgment, that one cannot be guilty of a conspiracy alone. But *per Cur.* it being but an action on the case it is well enough, and the plaintiff had his judgment.

Craft

Craft *verſus* Winter.

P. 181.

THE plaintiff declares, that the defendant in *London* ſpoke theſe words to the plaintiff, *Thou art a thieviſh fellow, and ſtoledſt the plate from* Wadham-*College in* Oxford. The defendant juſtifies, that the plaintiff ſtole the ſaid plate in *Oxford*. The plaintiff replies, that the defendant ſpoke the words *de injuria ſua propria*; and the iſſue tried in *London*, and found for the plaintiff.

Miſtrial. 1 Danv. Abr. 456. 1 Vent. 22. 1 Sand. 246. 2 Keb. 496.

And *Sanders* moved for the defendant in arreſt of judgment, becauſe a miſtrial, becauſe the iſſue ought to be in the county of *Oxford* where the juſtification is laid, and not in *London*; but adjudged for the plaintiff, becauſe it is aided by the new ſtatute of 16 and 17 *Car.* 2. *cap.* 8. But the defendant might have demurred upon it.

Kelyng, Chief Juſtice.
Twiſden,
Rainsford, and } Juſtices.
Morton,

Lady Broughton *verſus* Voſey.

Pleading.

TRESPASS for taking two horſes. The defendant pleads, That the dean and chapter of *Weſtminſter* have a court-leet in a particular juriſdiction, called the ſanctuary in *Weſtminſter*, within which the plaintiff hath a houſe, and that ſhe by reaſon of the tenure of that meſſuage, ought to have that part of the ſtreet before the door, and for not paving ſhe was preſented at the leet held ſuch a day, and affeered to 5*l.* and eſtreated, and the defendant as bailiff juſtifies the taking for the ſaid 5*l.* The plaintiff replies, and traverſes the *ratione tenuræ*, that ſhe ought to repair, and concludes, *Et hoc paratus eſt verificare, unde petit judicium*, if the plaintiff *ab actione ſua prædicta præcludi debeat*; and upon this the defendant demurs ſpecially, becauſe ſhe doth not conclude *unde petit judicium, & damna ſua occaſione tranſgreſſionis prædict' ſibi adjudicari, &c.* and for this cauſe the court ſeemed for the defendant; but a rule made by conſent to take traverſe and trial upon the tenure, upon payment of coſts to the defendant.

This term were made ſeventeen new ſerjeants, *(viz.)* of *Gray's Inn*, ſir *William Scroggs*, *Timothy Turnor*, *William Ellis*, *Thomas Hardres*, *Nicholas Wilmote*, and *Thomas Flint*. Of the *Inner Temple*, ſir *Richard Hopkins*, *Chriſtopher Goodfellow* and *Samuel Baldwin*. Of the *Middle Temple*, *John Turnor*, *John Barton*, *Francis Brampſton*, and ſir *Henry Peckham*. Of *Lincoln's Inn*, *Guibon Goddard*, ſir *John Howel*, *Thomas Powys*, and *Thomas Jones*; all which read, beſides *Scrogs* and *Jones*. They gave rings with this inſcription, *Rex Legis Tutamen*.

In the laſt vacation died ſir *Edward Atkins* knight, one of the barons of the exchequer.

Term.

Pordage *verſus* Cole.

Covenant. 2 Danv. Ab. 229. C. p. 1. 1 Lev. 274. 1 Sid. 423. 1 Sand. 319. 2 Keb. 533. 542.

DEBT upon a deed poll concerning the purchaſe of land made by the defendant, of the plaintiff, dated the 1*ſt* of *May* 1668. where the plaintiff declares, that by the ſaid deed it was agreed betwixt the plaintiff and defendant, that the defendant ſhould pay to the plaintiff ſo much money, upon ſuch a day, for the ſaid land, the which he hath not done, *unde actio accrevit*; and upon this count the defendant demurs. And *Withins* for the defendant alledged the cauſe to be, becauſe the plaintiff doth not aver that the defendant enjoyed the land; and where there is not a mutual remedy (the deed being only poll, and not being by indenture) there ought to be ſuch averment. 1 *Roll.* 518. *pl.* 3. *Holder* verſus *Taylor*. In covenant to repair, where the leſſee for years covenants to repair, *Proviſo*, that the leſſor find grand timber, there in an action of covenant the plaintiff ought to aver that he offered grand timber. So 5 *Co. Gray*'s caſe, 78. *b*.

Jones for the plaintiff. Here the defendant covenants to pay at a certain day, and perhaps the conveyance cannot be made by that day; and it doth not appear that the land was not conveyed before.

Kelyng chief juſtice. It ſeems no agreement of the other part, for it is not by indenture.

Twiſden juſtice. In covenant the words were, The plaintiff putting the houſe in repair, the defendant covenanted to keep it ſo repaired. Reſolved they were mutual covenants. *Cro. Jac.* 645. *Salter* verſus *Stone*, *Styles* 140. *Brag* verſus *Nightingale*.

Rainsford and *Moreton* juſtices. It ſeems a covenant by it ſelf; and judgment was given for the plaintiff; but the defendant brought a writ of error in the exchequer chamber upon the matter in law.

Drake

* P. 184. * Drake *verſus* Hill.

Words. 1 Danv. Abr: 228. p. 38. 1 Lev. 276. 1 Sid. 424. 2 Keb 549.

THE defendant ſaid of the plaintiff being a merchant and maintained himſelf and his family by buying and ſelling; Auſten Drake *is broke, and gone for* Virginia; *I have ill fortune, for* Auſten Drake *is failed, and I have loſt my monies.* Auſten Drake *is a beggarly fellow, and not worth a groat, and not able to pay his debts, and rides abroad with his man double armed for fear of bailiffs.* Upon Not guilty, verdict for the plaintiff.

And ſerjeant *Maynard* moved for the defendant in arreſt. 1. That the laſt words are not actionable; for *beggarly fellow* are only words of reproach, and *not worth a groat*, the caſe of *Moon* and *Moxam*, 14 *Car.* 1. Judgment was there reverſed in the exchequer chamber; and there is a difference when the words of themſelves are not actionable, yet if they be accompanied with ſpecial damage, they are actionable, as *Low* and *Harwood*'s caſe. Judgment in *Winſor* reverſed where he ſaid, that the defendant ſaid, that the plaintiff had not title to land, by reaſon of which he could not ſell, and *Nevil* and *Francis*'s caſe. And bankrupt is a crime that implies deceit, but to be poor is no crime.

Kelyng chief juſtice. To ſay that *he is not worth a groat*, is not actionable, becauſe he may be an honeſt man notwithſtanding; but it ſeems that the other words ſeem actionable.

Twiſden juſtice. *H.* may pay his debts, and yet not worth a groat after; but to ſay that *He is not able to pay his debts* is actionable; and judgment was given for the plaintiff.

Fola.

STINTON, keeper of the *Turnſtile*-tavern in *Holborn*, was informed againſt for uttering braſs halfpence, and he came in and confeſſed the fact laid in the information, and his fine was pardoned, and he was bound by recognizance not to utter any more.

Treſpaſs

Trespass for taking forty sheep, and chasing of them, by reason of which chasing one of them died; and the defendant pleads, that the place in which the chasing is supposed was his freehold, and that he *leniter* chased them, *quæ est eadem transgressio*. The plaintiff replies, and justifies for common. The defendant rejoins by inclosure; and the plaintiff demurs. And *Levinz* for the defendant urged that the bar is not good, because he doth not answer to the chasing of the sheep; for he ought to have traversed it. *Cro. Eliz.* 384. *Hill* versus *Prideaux*, and *Trin.* 19 *Car.* 2. *Copley* versus *Perry*.

Jones for the plaintiff. It is frequent in trespass to answer to the beating & *male tractation*', and that he *molliter manus imposuit, quæ est eadem transgressio*.

Twisden justice. The plaintiff relies by his replication upon the common, and waives the staying of the sheep, &c. and therefore it is good enough; and with this agreed the whole court; and judgment was given for the plaintiff.

This term *Timothy Littleton*, serjeant at law, was made one of the barons of the exchequer.

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* Term. Pasch. 22 Car. 2. B. R. * P. 186.

Contempt. 1 Mod. 44. 1 Lev. 288. 1 Vent. 66. 2 Keb. 635.

SMITH, *Hains*, *Tunman*, and others, commissioners of sewers in *Middlesex*, made an order concerning the amendment of a breach at *Blackwall*, and assessed the inhabitants of *White-Chappel* to contribute, and the inhabitants procured a *Certiorari*, and notwithstanding that the commissioners proceeded; and upon this an attachment was granted, and they were committed to the *Marshalsea* for the said contempt.

Ways. 1 Vent. 69. 2 Keb. 617.

Prere of *Raynham* in the county of *Kent* was indicted at the sessions at *Maidstone*, for not contributing to the repair of highways, contrary to the form of the statute of 2 & 3 *Phil.*

Phil. & Mar. cap. 8. and removed this by *Certiorari*; and when the record of the indictment was removed into this court, he came before juſtice *Morton*, and ſubmitted himſelf to a fine, who fined him upon two indictments to 20*s.* laſt *Michaelmas* term; and now the inhabitants ſuggeſt by motion and affidavit, that *Frere* hath eight plow-lands, and conſequently that he ought to have found eight carts for ſix days, and that the judge was ſurpriſed; and although that his land was paſture, yet the court ſet aſide the fine, and ordered, that he proceed to trial upon theſe indictments, if he do not agree with the pariſh before next aſſizes, for by his own confeſſion he hath 1700 acres of arable and paſture.

This term died ſir *Jeoffry Palmer*, knight and baronet, attorney general, and ſir *Heneage Finch* ſolicitor general ſucceeded in his place, and ſir *Edward Turnor* was made ſolicitor general.

* P. 187.

* Copping *verſus* Hurrier.

Intr. Hill. 20 & 21 Car. 2. Rot. 1261.

Award.
2 Danv. Ab. 540. p. 2.
1 Lev. 285.
1 Sid. 428.
2 Saund. 129.
1 Mod. 15.
2 Keb. 582. 619.
Poſtea *Dewen* verſus *Meſcal.*

DEBT upon an arbitrement, the ſubmiſſion was to two, *Ita quod* they make their award before the laſt day of *Michaelmas* term, and if they cannot agree, then to *A.* who then ſhall be umpire to make the award within the ſaid time; and the plaintiff declares, that the arbitrators did not make any award, but the umpire made his umpirage, and ſhews it; and the defendant demurs upon this count, becauſe the umpirage was void, becauſe the arbitrators had all *Michaelmas* term, and the umpire cannot intermeddle during that time, and for that it was adjudged for the defendant; and in this caſe was cited *Roll* 261. 1 *Part*, *Lumley* and *Hatton*'s caſe and *Barber* and *Giles*'s caſe, and *Dyer* 347. and *Barnard* and *King*'s caſe. *Vide Godbolt* 241. *pl.* 334. *Fial* verſus *Varier*, *contra.*

Horſeley *verſus* Potton.

Caſe.
1 Lev. 286.
1 Sid. 457.
2 Keb. 620, 647.

IN an action upon the caſe; the plaintiff declares, that he did lend his gelding to the defendant to ride from *Swaffham* in *Norfolk* to *Peterborough* in the county of *Northampton*, and the defendant abuſed the ſaid horſe *in itinere.* Upon Not guilty pleaded, verdict was for the plaintiff. And *Holt Junior* moved in arreſt of judgment, becauſe there is not any viſne where the abuſe of the gelding was, but

but only *in itinere*, *Cro. Jac.* 266. and *Cro. Car.* 20. *White* verſus *Riſden*; and judgment ſtayed till the other party moved.

Cheſter *and* Willan. *Ejectment.*

A DEVISE to eleven and their heirs; the defendant being one of the eleven, by indenture for 100*l.* granted, bargained, ſold and confirmed to another of the eleven; and if any eſtate paſſed was the queſtion, *(viz.)* where one joint-tenant grants to another, if this amounts to a releaſe; and adjudged that it doth. *Roll* 810. 1 *Part. Cro. Jac.* 314.

Releaſe.
1 Vent. 78.
2 Sand. 96.
1 Sid. 452.
2 Keb. 641.

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* Term. Trin. 22 Car. 2. B. R. * P. 188.

DIGHTON, town-clerk of *Stratford* upon *Avon*, was turned out of his place by the corporation, and he prayed a writ of *Mandamus* to reſtore him; and it was granted; and upon this the corporation returns, That the king by his letters patent grants, that they ſhall have a town-clerk which ſhall continue *durante bene placito* of the mayor and aldermen, and that the ſaid *Dighton* was made town-clerk, and they turned him out; and upon this return the queſtion was, If the corporation hath an arbitrary power to turn out the ſaid town-clerk, or ought to ſhew reaſonable cauſe.

Mandamus.
1 Lev. 291.
1 Vent. 77, 82.
1 Sid. 461.
2 Keb. 641, 656.

Jones for *Dighton*. Many corporations have ſuch officers, and it is of conſequence. *Cro. Jac.* 540. *Warren*'s caſe. An alderman cannot be ſo turned out; and as to *Blackgrave*'s caſe this was not argued; and here they did not give notice: but by all the court, the continuation of him in his office is in the will and pleaſure of the corporation; and upon this reſtitution was denied; but the court adviſed to repeal the patent becauſe inconvenient.

This term *Hugh Wyndham* ſerjeant at law was made baron of the exchequer.

Term.

The Juſtices being

Kelyng, Chief Juſtice.
Twiſden,
Rainsford, and } Juſtices.
Morton,

But *Kelyng* was ſick the whole term.

Michel *verſus* Biſby.

Prohibition. THE defendant ſued the plaintiff in the court of *Feverſham* upon an *Aſſumpſit* for wares; the defendant there, and the plaintiff here, tenders a plea, that the contract upon which the action is brought, was made out of the juriſdiction, and demands judgment if the court will take conuſance, &c. the court there refuſed to allow this. And *Jones* moved for a prohibition, producing an affidavit of the ſaid tender of the plea and refuſal; and the court granted the ſaid prohibition.

Rinch *verſus* ———

Error. THE caſe was ſuch. *Rinch* brought two actions on the caſe againſt a widow in the *Pipowder-Court* in *Gloucester* about two years ago; and about *January* laſt brought two other actions of the ſame nature againſt the ſame party. Upon the two firſt, judgments were given long ſince, and upon the two laſt the defendant had demurred, and judgment given againſt her, and writs of inquiry were executed, but no final judgment given. The defendant brings two writs of error, which were allowed by the mayor and town-clerk, and the two firſt judgments removed; whereas in
* P. 190. truth * the defendant intended to have the two other cauſes removed, and not the two firſt, for that they were long before

before ſatisfied; but notwithſtanding the ſaid writs of error, after the return thereof was out, the plaintiff entered judgment upon the two laſt actions, and took out execution upon the ſame; and the defendant moved by *Saunders* for the attachment. But reſolved *per Cur.* there is no contempt, becauſe when there were two judgments formerly entered, the town-clerk might certify them to ſatisfy the writs of error; and he could not certify the other two, becauſe no judgment was given upon them, and the writ of error commands to certify *ſi judicium redditum ſit*, and the defendant might have helped this by moving the court below after coſts taxed to have judgment entered in the two laſt actions as well as the plaintiff, for judgment ought to have been given at the requeſt of either party; and ſo the contempt was diſcharged.

Laſſels *verſus* Chatterton.

DEBT for 1000*l.* upon an indenture. The plaintiff declares, That by indenture the defendant did covenant with the plaintiff to convey certain lands in *Bowmer*, demiſed to *Bainton*, to the plaintiff, by ſuch conveyance as the plaintiff's counſel ſhould adviſe; and that the plaintiff, by the advice of his counſel, did tender to the defendant a conveyance by leaſe and releaſe, and ſets forth both in *hæc verba*, which releaſe contained ſeveral covenants, amongſt which one was againſt a ſtranger; and alſo here was comprehended a warranty againſt the defendant and his heirs, and that the plaintiff tendered the ſaid conveyance, and the defendant refuſed to ſeal the ſame. The defendant pleads, that he did not tender the ſaid conveyance; and iſſue was taken thereupon; and verdict *pro quer'*.

Condition. 2 Danv. Ab. 58. p. 24. 1 Sid. 467. 1 Mod. 67. 2 Keb. 885. *Vide* Syd. 467. Mod. Rep. 67.

And *Levinz* for the defendant moved in arreſt of judgment, becauſe the conveyance tendered is not ſuch as is warranted by the ſaid articles, becauſe it comprehends covenants, which it ought not to have done, and that the articles had been to make ſuch reaſonable aſſurance as counſel ſhould adviſe, and perhaps reaſonable covenants might have been inſerted, but not any covenant againſt a ſtranger, nor warranty. 2 *Cro.* 571. *Cokes* verſus *Kinder*. 1 *Roll* 424. *pl.* 13. *per Coke* 2. The agreement is to convey all the lands in *Bowmer* demiſed to *Bainton*; and the conveyance is not only of them, * but of all other his lands whatſoever; and for his laſt exception, *Weſton* for the plaintiff acknowledged that it cannot be good, and thereupon judgment was ſtayed. But by

* P. 191.

Twiſden

Twiſden juſtice, The law is altered ſince *Cole* and *Kinder*'s caſe, as to covenants in a conveyance, if they be reaſonable, but not that he is ſeiſed of an abſolute eſtate in fee-ſimple, or the like.

Nota. By *Twiſden* juſtice. It was reſolved in one *Long*'s caſe, that upon an information upon the ſtatute of uſury, he who borrows the money may be a witneſs after he hath paid the money, but not before.

Ellis *verſus* Winne.

Prohibition.

THE defendant ſued the plaintiff in the court of the *Marches of Wales* at *Ludlow*, for a legacy of 50*l.* and a braſs pot; and the plaintiff prayed a prohibition, by *Williams*, & *hobuit*, becauſe this court by their inſtructions have not power to hold plea of a legacy.

Dominus Rex *verſus* Wild.

Apprentice: 1 Lev. 296. 2 Keb. 686.

AN information upon the ſtatute of 14 *Car.* 2. *cap.* 5. againſt the defendant, being a worſted weaver in *Norfolk*, for retaining above two apprentices, contrary to the form of that ſtatute. Upon *Non culp.* pleaded, Verdict was found againſt the defendant.

And *Jones* moved in arreſt of judgment, becauſe the ſtatute is miſrecited, becauſe it is ſaid, at a ſeſſion of parliament holden at *Weſtminſter* by prorogation, 18 *Febr.* 14 *Car.* 2. following the printed book of Mr. *Manby*. Whereas the parliament roll is, and ſo is the print ſet out by the company of ſtationers, at the parliament begun at *Weſtminſter* the 8*th* of *May* 13 *Car.* 2. and there continued till 19*th* of *May* 14 *Car.* 2. and thence prorogued to the 18*th* of *February* then next following; and this miſrecital vitiates the count, for there was no ſuch ſeſſion of parliament as is alledged; and ſo was *Partridge*'s caſe, *Plowd.* 84. *a.* Although it be a private act, for the judges are to take notice judicially of all parliaments and their ſeſſions.

* P. 192.

* *Twiſden* juſtice. There is a difference when the information or action is grounded upon an act of parliament, and the concluſion is, *contra formam Statuti prædicti*, there the information is not good, if the ſtatute be miſrecited; but if the concluſion be *contra formam Statuti in hujuſmodi caſu editi & proviſi*, there it may be good, notwithſtanding the miſrecital, becauſe the court can take notice of a good act

act of parliament to puniſh the offence mentioned. But judgment ſtayed until, &c.

Bolus *verſus* Hinſtorke.

TRESPASS for breaking his cloſe, and taking and impounding the plaintiff's oxen. The defendant pleads, That ſir *Henry Vernon* was ſeiſed in fee of the cloſe called the *Low Leaſow* in *Peplow*, being the place where the taking is ſuppoſed, and he being ſo ſeiſed demiſed the ſame ſuch a day to the defendant for ninety-nine years, determinable upon three lives, by virtue whereof he entered, and was thereof poſſeſſed, and juſtifies taking the beaſts damage-feaſant and impounding them. The plaintiff replies, and confeſſes the ſeiſin of ſir *Henry Vernon*, and the leaſe to the defendant; but he farther ſays, That ſir *Henry Vernon* was alſo ſeiſed of another cloſe called *Bowns*, adjoining to *Low-leaſow* cloſe, and that there is and hath been time out of mind a cuſtom in *Peplow*, that the occupiers of *Low-leaſow* cloſe ought to repair the fences between the ſaid cloſes; and that the ſaid fences were out of repair, and that the cattle went into the defendant's cloſe *pro defectu ſepium*. The defendant takes iſſue upon the cuſtom, and a verdict for the plaintiff. And ſerjeant *Baldwin* moved for the defendant in arreſt of judgment: 1. That the replication was not good, becauſe the cuſtom, if good, is extinguiſhed by the unity of poſſeſſion in *Vernon*. 2. Admitting it not extinguiſhed, yet that cuſtom laid in occupiers is not good; but it ought to be laid in them who have the inheritance. 1 *Cro.* 302, 418. *Baker* verſus *Brereman*.

Extinguiſhment. 3 Danv. Abr. 419. p. 12. 1 Vent. 97. 2 Keb. 686, 707.

Twiſden juſtice interrupted, and ſaid, that point had been adjudged both ways. As to the unity of poſſeſſion, it doth extinguiſh the preſcription. *Dyer* 295. *b. pl.* 19.

And by *Twiſden* and *Morton* juſtices, The preſcription is gone by the unity. But it was adjourned, and ſtayed, &c.

* Bland *verſus* Levit. * P. 193.

THE plaintiff takes out a *Latitat* againſt the defendant with an *ac etiam billæ* for 60*l.* directed to the ſheriff of *Cambridgeſhire*, who ſends it to the bailiff of the franchiſe of *Ely*, who arreſts the defendant, and takes ſureties upon a bond of 40*l.* and then returns *Cepi Corpus*, but never brings in the body, but combining with the defendant lets him go at liberty, and the bailiff himſelf lives out of the

Officer.

franchiſe and employs a deputy. Several *Diſtringas*'s iſſued, but the bailiff is worth nothing, and ſo the plaintiff is like to loſe his writ; eſpecially the ſheriff having already returned iſſues upon the bailiff, he cannot return *Nichil*; and thereupon *Levinz* moved for an attachment againſt the bailiff; and it was granted, *niſi*.

Dominus Rex *verſus* Ladſingham.

Verdict. 4 Danv. Abr. 651. R. p. 1. 1 Lev. 299. 1 Vent. 97, 104. 1 Mod. 71, 288. 2 Keb. 687, 697. Poſtea 205.

AN information was exhibited againſt Mr. *Ladſingham* of *Devonſhire*, lord of a manor there, for oppreſſing his tenants, and for ſeveral miſdemeanors; and upon Not guilty pleaded, he was found guilty; and *Stroud* moved to ſet aſide the verdict, becauſe unduly given. The information being laid in *Devonſhire*, and the trial there, and yet the jury gave a privy verdict in the county of the city of *Exceſter*, which was illegal. 1. To give a privy verdict in a criminal cauſe, contrary to *Coke* upon *Litt.* 227. *b.* 2. To give the verdict out of the county. But to both theſe the court anſwered thus. *To the firſt.* 'Tis intended that no privy verdict can be given in criminal caſes which concern life, as felony, becauſe the jury are commanded to look upon the priſoner when they give their verdict, and ſo the priſoner is to be there preſent at the ſame time; but in criminal caſes, where the defendant is not to be perſonally preſent at the time of the verdict, a privy verdict may be given. *And as to the ſecond.* Cuſtom hath always been to give the verdict in that place; and the court did not think the firſt point fit to be moved, becauſe contrary to the record, but however they reſolved as before. *Vide poſt.*

* P. 194.

* Goodyear *verſus* Banks.

Caſe. 1 Danv. Ab. 190. p. 3. 2 Keb. 688, 716.

A SPECIAL action upon the caſe, wherein the plaintiff declares, That one *Proctor* brought an action againſt the plaintiff, in which the defendant was attorney for the ſaid *Proctor*, and that there was a trial in the ſame againſt the now plaintiff; and that after the trial, and before the rules were out according to the cuſtom of the court, the defendant did enter judgment againſt the now plaintiff, by reaſon whereof he was prevented from moving in arreſt of judgment. Upon this declaration the defendant demurred, but did not appear to maintain his demurrer. But juſtice *Twiſden* thinking it hard that an attorney ſhould be ſued after the ſaid judgment was ſet aſide, and conſequently the plaintiff

plaintiff not damnified, reſpited the giving judgment for a while.

The Dean and Chapter of Windſor *verſus* Gover.

DEBT for rent due for ſix years, upon a leaſe for years to the defendant, of tithes; the defendant as to the two years pleads *Nil debet*, and as to the other four years he pleads, that before any of the ſaid rent incurred, he aſſigned over the ſaid leaſe and tithes to one *Vaughan*, of which the plaintiff had notice, and did receive rent from him; judgment *ſi actio:* And upon this the plaintiff demurred generally.

Rent.
1 Lev. 308.
1 Vent. 98.
2 Saund. 296, 302.
2 Keb. 688, 722, 737, 775.

Jones for the plaintiff. The points are, 1. When the *Dean and Chapter* make a leaſe of tithes rendering rent, whether the money reſerved be a ſum in groſs, or a rent. 2. Admitting it to be a rent, yet the caſe being concerning a politick body, whether the acceptance ſhall bind, as in caſe of a private perſon. 1. This is a ſum in groſs, and doth not paſs by the grant of the rent, neither is the aſſignee liable thereto. 5 *Co.* 3. *a. Juel*'s caſe, 2 *Roll.* 446 and 451. That rent iſſues not out of tithes. *Co. Lit.* 47. *a.* The rent ſhall not paſs with the grant of the reverſion. 2. Admitting that it be a rent, yet this acceptance alledged in the plea ſhall not bind the corporation, becauſe they can do nothing but by attorney or bailiff made by their common ſeal, and cannot by themſelves take notice of this aſſignment.

Throckmorton *verſus* Tracy in *Plow. Com.* A leaſe for life by abby and covent without deed, ſhall be intended by deed, 1 Cr. 169. Edgar and Web *verſ.* Sorrel, Entry without warrant of Attorney, 2 Cr. 411.

Saunders for the defendant. If it ſhould be a ſum in groſs, then the plaintiff had no cauſe of action, for all the days are not yet incurred; and 2 *Cr.* 111. *Talentine* verſus *Denton*. It is a good leaſe, being for years: And it would be miſchievous if it were not a good leaſe, for if it were only a perſonal contract it would only go to the executors of the dean or biſhop, and not to the ſucceſſor, which would be contrary to the intent of the parties; and it is a rent payable for the tithes, though not iſſuing out of the tithes. *As to the ſecond point*, It ſhall be preſumed that the plaintiff accepted the rent from *Vaughan* legally.

* P. 195.

Twiſden juſtice. As to the ſecond point 'tis reſolved in *Magdalen College*'s caſe, 11 *Co.* 79. *a.* that ſuch acceptance is void. *Adjournatur.*

Mortlock *verſus* Charleton. *Error in* Nottingham.

Amerciament. 1 Danv. Abr. 479. H. p. 1. 2 Saund. 191. 1 Mod. 73. 2 Keb. 688, 704. 2 Rol. Rep. 45. Gerard *verſ.* Warren. Vide poſt. Powel *verſ.* Row.

DEBT upon a bond; the defendant pleads *Non eſt factum*, and afterwards *relicta verificatione cognoſcit actionem*, and judgment for the plaintiff, and the defendant *in miſericordia*; and this aſſigned for error, becauſe the judgment ought to have been, that the defendant *capiatur*, 8 *Co.* 60. *a.* Breecher's caſe; but becauſe 2 *Cro.* 64. *Devis* verſus *Clerk*, is, that it ſhall be *in miſericordia*, and ſo the books vary, *Adjournatur*.

Yard *verſus* Ford.

Nuſance. 1 Lev. 296. 2 Saund. 172. 1 Vent. 98. 1 Mod. 69. 2 Keb. 689, 766.

IN an action upon the caſe. The plaintiff counts that he is poſſeſſed of the manor and borough of *Newton Abbots* in the county of *Devon*, and hath and ought to have a market every *Tueſday* in the ſaid town; and that the defendant at *Aſhburton* in the ſame county, within ſeven miles of the ſaid *Newton Abbots* erected a new market, and keeps the ſame every *Wedneſday*, to the plaintiff's prejudice. Upon *Non culp.* pleaded, verdict was found for the plaintiff. And *Jones* for the defendant moved in arreſt of judgment, that this action will not lie, becauſe it appears that the erecting of this new market cannot be to the plaintiff's damage, it not being kept on the ſame day that the plaintiff's market is kept. 2 *Rol.* 140. *pl.* 2.

* P. 196. * *Twiſden* juſtice. There ſeems no difference when the new market is kept, whether on the ſame or any other day, ſo as it be to the plaintiff's prejudice, which is here found: But let it ſtay for a while to conſider; *Et adjournatur*. But afterwards it was adjudged for the plaintiff.

Dominus Rex *verſus* More.

Peace. 1 Keb. 689.

MORE together with *Turner* and *Smith* enter into a recognizance to the king, upon condition for the good behaviour of *More*; then *More* is indicted, for that he being ſo bound, did aſſault *J. S.* and ſo he hath forfeited his recognizance; and *Williams* moved to quaſh this indictment, becauſe *More* ought to have been proſecuted by *Scire facias* and not by indictment; and for this reaſon the indictment was quaſhed.

Jones

Jones *verſus* Powel. *Error in* C. B. for Words.

THE plaintiff declares, that he is an attorney of *C. B.* and that the defendant and he had diſcourſe of the plaintiff, and of his profeſſion; and that the defendant ſaid to the plaintiff *in auditu quamplurimorum, Thou canſt not read a declaration*, by reaſon of the ſpeaking of which words, *A. B.* and *C.* the plaintiff's former clients deſerted him, *ad damnum.* Upon Not guilty, a verdict for the plaintiff, and a judgment; and the ſaid judgment was affirmed. Words. 1 Danv. Ab. 118. p. 1. 1 Lev. 297. 1 Vent. 98. 1 Mod. 272. 3 Keb. 710.

Dominus Rex *verſus* Allen.

AN information upon 12 *Car.* 2. *cap.* 13. for taking exceſſive uſury. The information is, That the defendant 16 *November* 20 *Car.* 2. did lend to *J. S.* 20*l.* till *June* then next following, and that afterwards, *viz. ad finem termini prædicti*, he took of the ſaid *J. S. corrupte & extorſive*, for the loan aforeſaid, 30*s.* which was above the rate by the ſaid ſtatute allowed. Upon Not guilty pleaded, a verdict was found againſt the defendant; And *Kelyng* moved for him in arreſt of judgment, becauſe the corrupt agreement ought to be within the ſtatute at the making of the contract, and not at the end of the term, as it is laid in the information. Uſury. 2 Keb. 690. 1 Mod. 69.

* *Twiſden* juſtice. There is this difference, if the party who lends the money contracts for more than 6*l. per cent.* all the aſſurance is void: but if he doth not contract for more than the ſtatute allows, and afterwards he will take more, the aſſurance ſhall not be avoided, but the party ſhall forfeit the treble value; as if a man when money was at 8*l. per cent.* lends money, and takes bond for the ſame, and then the ſtatute of 12 *Car.* 2. is made, and he will continue the old intereſt upon that bond, the bond ſhall not be avoided by ſuch acceptance of intereſt, but the party ſhall forfeit the treble value by the ſtatute; but judgment was ſtaid till the other ſide moved, becauſe the court would adviſe. * P. 197.

Twyford *verſus* Bernard. Trin. 22 Car. Rot. 586.

DEBT upon a bond of 300*l.* The defendant pleads that the ſaid writing was delivered as an eſcrow to one *Godfrey Woodward* a ſtranger, upon condition, That if the Obligation. 2 Keb. 690, 733.

the plaintiff ſhall procure a demiſe of certain tenements to the defendant from a certain company in *London*, or ſhould give good ſecurity that he would procure the ſaid demiſe before ſuch a day, that then the ſaid *Woodward* ſhould deliver the ſame, *ut ſcriptum ſuum* to the plaintiff, otherwiſe that he ſhould keep the ſame in his hands; and the defendant pleads, that the ſaid *Woodward* did not procure the ſaid demiſe, nor give ſecurity as aforeſaid; & *ſic non eſt factum ſuum*. The plaintiff demurs, becauſe he anſwers not the deed, for *Woodward* never had authority to deliver his writing *ut factum*, but *ſcriptum ſuum*, which is not good; and ſuch was the opinion of *Twiſden* and *Rainsford* juſtices; but *Morton contra*. But *Simpſon* being of counſel for the defendant, moved that the plaintiff might take iſſue upon the ſpecial plea, *ſcriptum* being made *factum*; and judgment thereupon was ſtaid entering for a time.

† P. 198. * Boxwiſt *and four others executors of Mr.* Pinſent, *late one of the Prothonotaries of the Common Pleas, againſt* Tremain. Trin. 21 Car. 2. Rot. 1512.

Executor.
1 Danv. Abr. 604. p. 3.
3 Danv. Abr. 412. p. 3.
1 Vent. 102.
1 Lev. 299.
1 Mod. 47, 72, 296.
2 Keb. 625, 633, 691, 698, 537.
1 Sid. 449.
2 Saund. 212.
Vide poſt 243.
S. Barbe *verſus* Burton.

INDEBITATUS ASSUMPSIT for monies received to the teſtator's uſe for damage clere. The defendant pleads in abatement, that two of the plaintiffs (and names them) are under the age of ſeventeen years. The plaintiff demurs, and whether the three that were of full age, and the infants ought to join in this action was the queſtion. *Coleman* for the defendant, That they cannot join, becauſe the infants under ſeventeen years are not capable of adminiſtering, but there ought to be an adminiſtrator *durante minori ætate*, as ſir *Moil Finch*'s caſe is, and therefore they cannot be more able by being joined with others.

Hatton *verſus* Maſkew and another.

Trin. 15 Car. 2. B. R. Rot. 1117.

Executor.
3 Danv. Abr. 412. p. 3.
1 Lev. 181.
1 Lev. 750.

IN a writ of error in the exchequer-chamber, upon a *Scire facias* brought by *Maſkew* and one other to have execution of a judgment in debt; the plaintiff ſets forth in the writ of *Scire facias*, that the teſtator made the plaintiff and another his executors, and that the other is under the age of ſeventeen years; and the defendant demurred upon the writ, for this very cauſe, that the other upon the plaintiff's own ſhewing was a joint executor, and not joined in the

the action. But resolved the writ was good, because the infant ought not to join, and so judgment was here given, and also affirmed in the exchequer-chamber.

Offley for the plaintiff. There is a difference where there is but one executor, and he an infant under the age of 17, and where there are other executors joined with such infant; for in the first case the infant cannot sue, but in the other case an infant may be joined with the others. True it is, the executors of full age may sue without the infant, and set it forth in their declaration, as in *Hatton* and *Maskew*'s case cited by *Coleman*; but 'tis as well where they all join. * 1 *Roll.* 288. *pl.* 2. and the very case ruled in *Yelverton* 130. * P. 199. *Smith* versus *Smith*, and 3 *Cro.* 378. If three executors, and one be an infant, yet they shall all join in the action by an attorney, and the infant shall not sue by guardian, because they all make but as it were one person, and represent their testator jointly.

Twisden justice. The action is well brought by all the executors jointly, and no administration can be granted during the minority of the infants, and all make but one person; and it may be brought either as *Hatton* and *Maskew*'s case is, or this way, and both good. *Sed adjornat.* But afterwards adjudged *Quod Def. respondeat ouster*, by *Rainsford* and *Moreton* against *Twisden*, who held the plea good, because an infant is an executor, *quoad esse, non quoad executium.*

Hayman *versus* Truant.

Pleading. 1 Vent. 101. 1 Mod. 72. 2 Keb. 692.

IN *Assumpsit*. The plaintiff declares that the defendant such a day and year bargained and sold to the plaintiff certain corn, affirming the same to be his own, and warranting it to the plaintiff, whereas it was the corn of one *Stokes*, who since recovered damages against the plaintiff for the same. The defendant pleads a prior action for the same matter still depending in abatement of the bill. The plaintiff replies, that the contracts are several, and the cause in the former action and this are several and for several matters, *Absque hoc*, that they are for the same matter. And the defendant demurs specially, *viz.* because the plaintiff ought to have concluded to the country, and not taken a traverse; for by that means the defendant might have rejoined, and so an infinity might be in the pleading; and so seems 3 *Cro.* 755. *Huish* versus *Philips*.

Twisden justice. The pleading is well, and so is the constant practice. And the case of *Huish* and *Philips* was adjudged

judged upon another point, *viz.* for defect in the plea, because it is, *Et prædictus Bush (un stranger) dicit, pro le Defendent.* As appears in *Yelverton* 38. & 3 *Cro.* 13. where the same case is also reported. *Et Judgment fuit done pur le Plaintiff quod Def. respond' oust'.*

* P. 200. * Hambleton *versus* Bere.

Damages. 2 Danv. Abr. 460. p. 12. 1 Lev. 299. 2 Saund. 169. 2 Keb. 693, 697.

IN a special action upon the case for inticing his apprentice out of his service. The plaintiff declares, that 16 *Car.* 2. he entertained *A.* his apprentice to serve him for nine years, and that the defendant inticed the said *A.* from his said service, *per quod* he hath lost his service for the whole term of nine years: Upon *Non Culp.* pleaded, a verdict was given for the plaintiff.

And *Saunders* for the defendant moved in arrest of judgment, because the plaintiff hath brought his action too soon, or at least hath laid his damnification too large, because he hath alledged his damage to be by the loss of the apprentice's service for the whole term, whereas it appears that some years of the nine are yet to come; and so the jury have given damage for what the plaintiff hath not sustained loss, and the apprentice may return, and yet the plaintiff recover for his absence; and of this opinion was justice *Twisden*, and therefore the judgment was staid till farther motion to be made by the plaintiff; and afterwards judgment was arrested, because the jury was guided by the *per quod.*

Guilliams *versus* Munnington. *Hereford.*

Replevin. 1 Lev. 308. 1 Vent. 180.

ON replevin for taking his cattle; The defendant avows for that *A.* was seised in fee in the place where, *&c.* and being seised, by his deed *hic in Curia prolat'*, granted to *Anne Munnington* a rent-charge out of the said lands with a clause of distress to *Anne Munnington*, who by indenture of bargain and sale duly inrolled in the sessions at *Hereford*, granted the said rent and arrears thereof to the defendant; and because so much was in arrear, the defendant avows the taking. The plaintiff pleads in bar to this avowry, that the defendant took the said cattle *de injuria sua propria, absque hoc*, that the said *Anne Munnington* did grant the said rent and arrears to the defendant; and issue is taken thereupon, whether *Anne Munnington* did grant the rent and arrears to the defendant; and verdict for the defendant.

And

And *Jones* moved for the plaintiff in arreſt of judgment. 1. Becauſe the grant is alledged to be of a rent and of the arrearages thereof, and iſſue is taken thereupon, and the * jury find the grant of the rent and arrearages; whereas it is impoſſible that any ſuch grant can be, becauſe the arrears are not grantable over, becauſe things in action, and therefore there ought to be a repleader in this caſe. *Heb.* 112. *Taſker* verſus *Salter*, *Moor* 867. *pl.* 1198. 2 *Cr.* 131. *Marham* verſus *Peſcod*. And though iſſue be found for the avowant, yet it being impoſſible, 1. It will not be helped. 2 *Cro.* 682. *Buckland* verſus *Otely*. 2. The avowant hath not made a good title to the rent, becauſe he pleads it by way of bargain and ſale, and that by virtue thereof, and of the ſtatute for transferring uſes into poſſeſſion he was ſeiſed, and yet alledges no conſideration, not ſo much as *pro quadam [illegible] cumiæ ſumma*, which is not good. * P. 201.

Twiſden juſtice. The firſt exception ſeems of little validity after verdict, but the ſecond is material, and judgment ſtaid until, *&c.*

Dominus Rex *verſus* Saunders.

Scandal.

INFORMATION for writing a ſcandalous letter to *Hatton Rich*, brother to the earl of *Warwick*, who was indebted to him 300*l.* and this *Saunders* having been delayed for three years by the ſaid Mr. *Rich*'s obtaining a protection, and at length taking the priſon of the *King*'s *Bench*, he wrote a letter to him, wherein he tells him, *That if he had any honeſty, civility, ſobriety or humanity, he would not deal ſo by him*; *and that he would one day be damned and be in hell for his cheating*, or words to the like effect, and cited ſeveral places of ſcripture to make good his allegations. And in the information was laid, that he publiſhed this letter in the preſence *Quamplurimorum*; and upon *Non Culp.* the defendant was found guilty of all; whereas (in truth) if the matter had been taken care of at the trial, the publication was not proved.

And now *Saunders* moved in arreſt of judgment, for that the ſubſtance of the letter is not ſcandalous, but impertinent and inſignificant, and ſhews a zeal in the defendant to manifeſt his ſenſe of the injury he hath ſuſtained by the nonpayment of the money.

Twiſden juſtice. The letter is provocative, and tends to the incenſing Mr. *Rich* to break the peace, and therefore an information lies: *Mes adjornat'*. And afterwards the court adjudged the letter ſcandalous; and *Saunders* was fined 40 marks.

Dominus

* P. 202. * Dominus Rex *versus* Sykes.

Perjury.

INFORMATION for perjury; upon Not guilty pleaded, upon the trial the record of the trial wherein the defendant is alledged to be perjured, was produced, and it varied from what it was laid in the information, and at the assises it was allowed to be found specially: and upon opening the verdict by *Bigland* for the defendant, it was resolved by *Twisden* justice and the whole court (*absente Kelyng* chief justice) that the jury cannot have conusance of any variance between the record and the information; but the judge at the trial ought to have determined it; and so a *Venire facias de Novo* ought to issue.

Powel, *versus* Row.

Mich. 21 Car. 2. Rot. 807.

Amerciament. 1 Danv. Ab. 479. H. p. 1. 2 Keb. 674. 694. Vide *ante* Northlock *versus* Charlton.

ERROR to reverse a judgment given in *Bristol*. In an action of debt upon an obligation, the defendant pleads *Non est factum*, and afterwards *relicta verificatione* confesses the action, and the judgment thereupon is entered, *Quod defendens sit in misericordia*. And the error assigned was on that part of the judgment, whereas it ought to be *Capiatur*, according to *Dyer* 67. *pl.* 19.

Aires for the defendant. That it is well enough, for that no book warrants the case in *Dyer*, but 8 *Co.* 60. *a.* *Baker*'s case; and if we look into the reason, it is plain, that it ought to be *misericordia*, because the judgment is upon the confession of the action, and not upon the defendant's former plea: and of this opinion is 2 *Cr.* 64. *Davidge* versus *Clark*. *Mich.* 33 *H.* 6. 54. *b. pl.* 44. *Mich.* 34 *H.* 6. 20. *a. pl.* 37. *Keilw.* 42. *a. pl.* 4. *Rast. Intr. tit. Debt*, in *Recovery* 4. and *Judgment* 3. 1 *Roll.* 224. *Wrign*'s case, and so is the constant course, and so are all the precedents in *B. R.* and *C. B.* And the case of *Dyer* is but as he found it recorded, but *Trin.* 9 *E.* 4. 24. *a.* is *Misericordia*.

Twisden justice. As for the book of 2 *Cr.* it is but the opinion of *Fenner* and *Williams* against *Gawdy*, and *Coke* and *Dyer* are for a *Capiatur*, and therefore it seems it should
* P. 203. be * so; but if the precedents are *Misericordia* it will alter the case. *Et adjornat*. *Mich.* 44 *E.* 3. 42. *b. pl.* 47. *Mich.* 45 *E.* 3. 11. *a. pl.* 4.

Cock

Cock *verſus* Honychurch.

TRESPASS and aſſault. The defendant pleads a concord between him and the plaintiff, *viz.* that he ſhould pay the plaintiff 3*l.* in hand, and ſhould undertake to pay the plaintiff's attorney's bill; and avers that he paid the 3*l.* and that he was always ready to have paid the attorney's bill, but he never ſhewed him any. To this the defendant demurred. Accord. 1 Danv. Ab. 240. p. 18. 2 Keb. 696.

Powlet for the defendant. That it is a good plea.

The grand objection is, That here is no execution of this agreement.

Reſp. 'Tis an execution, for the payment of the 3*l.* is made, and the agreement is not to pay, but to undertake the payment of the attorney's bill, which is accordingly done. And upon his undertaking, the plaintiff or the attorney may have a remedy, and ſo good according to *Plowd.* 11. *b.* and in *Peytoe*'s caſe, 9 *Co.* 77. *b.* There was an obligation given for payment of the money, and here is a promiſe made, which are of the ſame nature.

Twiſden juſtice. This accord is not good, becauſe not executed; and of that opinion was the whole court (*abſente Kelyng* chief juſtice) and judgment was given for the plaintiff.

Smith *verſus* Smith. *Aſſumpſit.*

THE plaintiff declares, that he and the defendant were executors to *A.* and the defendant did receive all the eſtate of the teſtator, whereas a moiety thereof did and doth belong to the plaintiff, and that the plaintiff did threaten the defendant to ſue him to come to an account; and thereupon the defendant, in conſideration that the plaintiff did promiſe to forbear the ſaid ſuit, and to ſhew an account concerning the eſtate of the teſtator, the defendant promiſed to pay to the plaintiff 100*l.* The plaintiff avers that he did forbear the ſaid ſuit, and did ſhew an account to the defendant, and yet that he hath not paid the 100*l.* Upon *Non Aſſumpſit* pleaded, and verdict for the plaintiff, Aſſumpſit. 1 Mod. 284. 2 Keb. 695, 703.

* *Jones* moved in arreſt of judgment. 1. The plaintiff doth not ſet forth where he would have ſued the defendant, and perhaps it was in ſome court which had not juriſdiction. 2. He avers that he ſhewed *quoddam Compotum*, which is not good; but he ought to have ſaid *Compotum prædictum.* * P. 204.

prædictum. Dyer 70. *b. Paſch.* 1 *H.* 7. 19. *pl.* 4. But notwithſtanding theſe exceptions, judgment was given for the plaintiff.

Pierſon *verſus* Riddley. *Replevin.*

Diſtreſs. 2 Danv. Ab. 636 p. 7. 1 Vent. 105. 2 Keb. 701, 739, 745.

THE defendant avows the taking, for that he is ſeiſed of the manor of *A.* to which he hath a leet belonging, and that by cuſtom time out of mind uſed, the inhabitants of *D.* uſed to ſend a conſtable to the ſaid leet; and that he before *H.* his ſteward at *A.* held the ſaid leet, and gave notice thereof at *D.* and that they did not ſend a conſtable, and thereupon the ſaid ſteward impoſed a find of 39*s.* 11*d.* upon the inhabitants, and that he diſtrained the plaintiff for the ſaid fine. The plaintiff traverſes the cuſtom, and found for the avowant.

And *Shafto* for the plaintiff moved in arreſt of judgment for two cauſes. 1. Becauſe the avowant ought to have alledged a cuſtom to diſtrain for the fine, as well as for the ſending the conſtable, which he hath not done. 1 *Leon.* 242. *pl.* 327. *Blunt* verſus *Whitacre*, 11 *Co.* 44. *b. Godfrey*'s caſe; for it is againſt common right. 2. The fine is unreaſonable.

Weſton contra. To the 1*ſt.* A diſtreſs is incident to a fine of common right; and when he alledges a cuſtom to impoſe a fine, a diſtreſs is thereby implied, and it differs from an amerciament in a court baron.

To the 2*d.* All the ville is amerced, and 39*s.* is no great fine for a whole townſhip.

Twiſden juſtice. When a duty is raiſed by cuſtom, a diſtreſs for that duty muſt be maintained by the like cuſtom. *Sed adjornat'.*

Gibbs *verſus* Stratford.

Diſcontinuance 2 Keb. 702.

TRESPASS of falſe impriſonment. The defendant juſtifies by virtue of an arreſt in obedience to a precept out of *Warwick* court, returnable *ad proximam Curiam*; and upon this the plaintiff demurs, becauſe the proceſs ought to * be returnable on a day certain, and not *ad proximam Curiam*; for ſo the court not being held, the party may be perpetually impriſoned, and ſo is 2 *Cr.* 314. *Johns* verſus *Smith*, *Dyer* 262. *b. pl.* 33. 3 *Cr.* 105. *Leat* verſus *Jennings.*

* P. 205.

Twiſden juſtice. The caſe of *Dyer* was good enough not-

notwithſtanding that error; but the judgment was reverſed for other errors, as appears, 1 *Roll.* 486. *pl.* 2. *Jeſſon* verſus *Laxen.* *Sed adjornat'.*

Dominus Rex *verſus* Leſingham. *Antea* 193.

INFORMATION. For that the defendant did outrageouſly make diſtreſſes upon his tenants, and was a perturber of the peace and common oppreſſor; and upon Not guilty pleaded, the jury found him guilty.

Verdict. 2 Danv. Ab. 651. R. p. 1. 1 Lev. 109. 1 Vent. 97, 104. 1 Mod. 71, 286.

And *Jones* moved in arreſt of judgment, 1. For that at the common law a lord was not puniſhable for diſtraining, and ſo no information lies therefore; but the party is to be amerced by the ſtatute of *Marlb. cap.* 4. not fined, as he muſt be upon an information; and an action upon the caſe did lie at the common law. 2 *Co. Inſt.* 107.

2. Admit that an information lies in this caſe, yet it is not good without ſhewing when he diſtrained, which is not done but in general, *his Tenants*, which is uncertain; and alſo he ought to ſhew how the diſtreſſes were unreaſonable.

3. The information is, that he is *Perturbator pacis & Communis Oppreſſor*, which is too general; true it is, that *Communis Barrectator* without other circumſtance is good, but in no other caſe, as *Communis Latro*, 29 *Aſſ. pl.* 45. *a.* as *Oppreſſor multorum hominum*, without ſaying *whom*, is not good. 2 *Roll.* 79. *pl.* 2. *Moor* 302. *pl.* 451. *Cornwall*'s caſe.

Twiſden juſtice. The information can never be made good, becauſe too general; and information lies not for diſtreſſes, becauſe private offences: and ſo judgment was ſtaid.

Denovan *verſus* Maſcal.

DEBT upon an obligation, *Conditioned to ſtand to the award of* A. *and* B. Ita quod *they make their award upon or before the* 19*th of* February, *and if they ſhall make no award, then to ſtand to the umpirage of ſuch a one as the arbitrators ſhall chuſe.* And the words are: *But if they do not award, then I bind myſelf to ſtand to the award of ſuch umpire as they ſhall chuſe.* And upon *Nullum Arbitrium* pleaded, the plaintiff ſets forth an umpirage, and the defendant demurs; and adjudged for the defendant; for though the arbitrators may chuſe an umpire at any time during the continuance of their power, yet that umpire cannot

Award. 1 Danv. Ab. 541. p. 5. 1 Lev. 304. 1 Mod. 274. 1 Keb. 714. Copping *verſus* * P. 206. Hurrier, ante 187.

not act till the arbitrators time is expired, which in this case is now. By *Twisden* and *Rainsford* justices.

Draper *versus* Blaney.

Writs. 1 Lev. 291. 2 Keb. 649, 657, 724. 2 Saund. 193. Nedham *versus* Benet, ante 171.

UPON a judgment in this court, a *Fieri facias* issued out; and upon a *Nulla bona ret'* in *London*, the plaintiff takes out a *Testatum Fieri facias* directed to the sheriff of *Montgomery* to levy the monies in the hands of the defendant executor. The sheriff returns, that this is a county in *Wales*, and that *Breve Domini Regis non currit in Wallia*.

And *Saunders* moved that the sheriff may be amerced, and amend his return. By the statute of 1 *E.* 6. *cap.* 10. the sheriffs of *Wales* ought to have their deputies in the courts at *Westminster*, and the sheriff cannot dispute the process of the court. 2. This writ doth lie in *Wales*. The question in the old books is concerning original writs, as *Quare Impedit*, &c. but no question concerning writs of execution, and by the statute of 27 *H.* 8. *cap.* 26. *Wales* is made parcel of the realm of *England*; and in 34 & 35 *H.* 8. *cap.* 26. there is a clause, *That all process for weighty causes shall be directed into* Wales *by the chancellor and council*, which is intended the judges. And here is a weighty cause; for unless this process be allowed, the plaintiff hath no remedy for his debt; for an action of debt lies not in *Wales* upon judgment given here.

Object. The statutes of 1 *E.* 6. *cap.* 10. and 5 *E.* 6. *cap.* 26. in the recital.

Resp. An original out of the chancery here doth not run in *Wales*, as in a county palatine; but a writ of execution doth. *Het.* 18. *Manser* versus *Lewys*, *Elegit* lies and a *Fieri facias*, 2 *Cr.* 484. *Carp*'s case, a *Certiorari*, and by *Dodderidge* a *Capias* upon a recovery, 2 *Bulstr.* 156. *Bedo* versus *Piper*, and 54. *Hall* versus *Rotheram*. And afterwards it was adjudged an ill return by *Twisden*, *Rainsford* and *Morton* justices.

* P. 207.

* Vivian *versus* Willet.

Words. 1 Danv. Ab. 128. p. 40. 2 Keb. 718.

THE plaintiff declares, That he was at the time of the words spoken, and yet is, a merchant; and there being a communication of him the defendant spake these words of him: *I believe all is not well with* Daniel Vivian; *there are many merchants that have lately failed, and I expect no otherwise of* Daniel Vivian. After verdict adjudged for the plaintiff.

Wilson

Wilson *versus* Armourer.

DEBT upon an obligation against the defendant as heir; the defendant pleads *Riens per discent*, and issue taken that he had assets; and the jury find a special verdict, *viz. That* William Armourer *the defendant's father, was seised in fee of the manor of* D. *and* 8 April 1657. *made a feoffment to* Bray *and others of all the said manor, except the two meadows in question, during his life, to the use of the defendant in tail*; and whether the meadows excepted did descend to the defendant, was the question.

Heir.
1 Lev. 287.
1 Vent. 78, 87, 106.
2 Keb. 642, 643, 667, 719.
3 Salk. 157.

And after argument at the bar several times, judgment was delivered by Mr. justice *Twisden* in the name of the other judges for the plaintiff, *That the meadows did descend*: Whereon these points were proposed.

1. Whether the exception of these meadows for his life only, be a good exception? And resolved a void exception, because contrary to the rules of law to have a livery operate *in futuro*; otherwise perhaps it had been if the exception had been for years only.

2. Whether in this case the exception be all good, or all void? And as to this point some of the judges differed. This is a *Quære* in *Plowd. Quæries* 71. *pl.* 146. But though it be void, yet it doth amount to an indication of the intent of the feoffor, that the same should not be according to the limitations of the other lands. So *Plowd.* 85. Lease of an house with the lands thereto appertaining, though lands cannot properly belong to an house, yet it declares the intent of the party that it should pass, and so it is as much as therewith used. *Perkins* 13. *Dyer* 319. 11 *Ca. Auditor Curl*'s case. * And judgment was given for the plaintiff. *Vid. Dyer* 264. *b. pl.* 40. 1 *Anderf.* 52. *pl.* 129.

* P. 208.

Dominus Rex *versus* Brown.

OUTLAWRY upon an inquisition for a *Deodand* for the death of one *Barker*, *existen' infra ætatem quatuordecim annorum.*

Deodand.

Coleman moved to quash the inquisition, because no *Deodand* is due therefore. 1 *Stamf. cap.* 12. 3 *Co. Inst. Fitz. Corone*, 8 *E.* 2.

Twisden and *Morton* justices. There is no reason for that opinion. *Mes adjornat.*

Term.

Harriſon *verſus* Groſvenor. *Replevin* in Eſſex.

Diſtreſs. 2 Keb. 692, 704, 726, 823, 836, 841.

THE caſe was, ſir *Thomas Smith* deviſed his eſtate to truſtees in fee to ſuch charitable uſes as the lord *Lumley*, ſir *Henry Hen*, *&c.* ſhall diſpoſe. They declare 5*l.* to the poor of the pariſh of St. *Mary* in *Cheſter*; and the commiſſioners decree that the church-wardens and overſeers of the poor of St. *Mary* ſhall diſtrain for this 5*l.* And upon this two queſtions were made: 1. Whether the commiſſioners may add a power of diſtreſs, where there was none by the original gift? And 2*dly*, Whether the commiſſioners in *Cheſhire* can bind lands in *Eſſex* with ſuch clauſe adjoined? Adjudged for the avowant in both points.

Term. Paſch. 23 Car. 2. B. R.

THIS term ſir *Matthew Hale*, lord chief baron, was ſworn chief juſtice of the *King's Bench* after the death of ſir *John Kelyng*, who was a learned, faithful and reſolute judge.

Term.

Burnet *verſus* Holden.

Executor. 3 Danv. 388. p. 13. 1 Lev. 277. 1 Mod. 6. 2 Keb. 549, 559, 692, 783, 800.

A SCIRE FACIAS againſt an executor to have execution upon a judgment obtained againſt the teſtator. The defendant demands *Oyer* of the record, and by it it appears that the plaintiff brought an action upon the caſe upon a promiſe againſt the teſtator. And upon *Non Aſſumpſit* pleaded, a trial by *Niſi prius*; and between the trial and day in bank the teſtator died. The defendant pleads a debt due to him from the teſtator upon an obligation, and that he retains ſo much in ſatisfaction of his ſaid debt, and that he hath not aſſets *ultra*. The plaintiff demurred; and the ſole queſtion reſts upon the conſtruction of the ſtatute of 17 *Car.* 2. *cap.* 8. whether that act ſhall ſupply the death of the defendant, ſo as to make the judgment good againſt the defendant's debt; and after argument adjudged for the plaintiff.

Sir *Matthew Hale*, Chief Juſtice.
Sir *Thomas Twiſden*,
Sir *Richard Rainsford*, and } Juſtices.
Sir *William Morton*,

Officer. Mandamus. 1 Vent. 143, 153. 2 Keb. 802, 807, 810.

Iſles, ſexton of the pariſh church of *Kingsclere* in *Hampſhire*, moved for a mandamus to be reſtored to his office: And the court gave time to conſider, whether any precedents would warrant ſuch a writ. And it was afterwards allowed.

Daviſon *verſus* Hanſlop. *Aſſumpſit.*

Executor: 1 Danv. Abr. 31. p. 11. 53. p. 33. 3 Danv. Ab. 380. p. 2. 2 Lev. 20. 1 Vent. 152. 2 Keb. 813.

THE plaintiff declares, That one *Fenwick* was in arrear to him in 100*l.* for an annuity, and that the defendant was bailiff and receiver of the rents of the ſaid *Fenwick*, who appointed the defendant to account with the plaintiff, and to pay all which ſhould be found in arrear of the annuity, out of the next rents due at *Martinmas*; and that upon an account there was 100*l.* found due to the plaintiff; and the defendant *adtunc exiſtens Receptor* of the rents of the ſaid *Fenwick* aſſumed to the plaintiff, that if he would forbear the ſaid arrears for a month after the ſaid *Martinmas*, that he would pay the ſame, and avers, that he ſtaid accordingly, and that yet the defendant hath not paid. Upon *Non Aſſumpſit* pleaded, a verdict was found for the plaintiff.

And *Weſton* moved in arreſt of judgment, for that it doth not appear that the defendant had effects in his hands at the time of the promiſe.

* P. 212. * *Per Curiam.* Shall be preſumed that he had effects after a verdict, being alledged that he was *adtunc Receptor*; and judgment was given for the plaintiff.

Theophilus

Theophilus Green and others were indicted at *Juſtice Hall* in the *Old Baily* for refuſing the oath of allegiance contained in the act of 3 *Jac. cap.* 4. And being convicted, judgment of *Præmunire* was given againſt them according to the directions of that ſtatute; and they brought a writ of error; and by *Coleman* aſſigned for error, that the oath injoined by that ſtatute is not now in force, but expired with the death of king *James:* For that the words thereof are, *That king* James *is rightful king, &c.* and doth not mention his heirs or ſucceſſors; and the ſtatute ſays, *They ſhall take the oath*, and the indictment is, *For refuſing the oath, in his Anglicanis verbis*, and ſets forth the oath *verbatim*, and ſo it is not like 7 *Jac. cap.* 4. which orders taking the tenor of the ſaid oath; and the words *king JAMES* ſhall not include his ſucceſſors. *Moor* 176. *pl.* 311. Oath. 1 Vent. 171. 2 Keb. 825, 830.

Hale chief juſtice. The conſtant practice hath been otherwiſe, and the ſame objection may be made to the oath in 1 *Eliz. cap.* 1. And the word *tenor* is as much as that it were *verbatim*; and the name of the perſon is only an inſtance of the thing intended, and the word *king* extends to his ſucceſſors; and judgment was affirmed.

John Manning was indicted in *Surrey* for murder, for the killing of a man. And upon Not guilty pleaded, the jury at the aſſizes find that the ſaid *Manning* found the perſon killed committing adultery with his wife in the very act, and flung a jointed ſtool at him, and with the ſame killed him; and reſolved by the whole court, that this was but manſlaughter; and *Manning* had his clergy at the bar, and was burned in the hand; and the court directed the executioner to burn him gently, becauſe there could not be greater provocation than this. Murder. 1 Vent. 158. 2 Keb. 829.

* Sacheverel *verſus* Frogate. *Covenant.* * P. 213.

THE plaintiff's anceſtor (whoſe heir the plaintiff is) ſeiſed in fee, demiſes to the defendant, rendering rent to the leſſor, his executors, adminiſtrators and aſſigns during the term. And the plaintiff declares as heir, and the defendant demurs in law; and adjudged for the plaintiff. For though the reſervation be but to the leſſor, his executors, *&c.* and not to his heirs, as it ought to be to intitle the heir, yet it being *(during the term)* it ſhall run with the reverſion. And the caſe of *Richmond* and *Butler*, 3 *Cr.* 217. is miſtaken in the law, for the caſe there intended, Heir. 1 Vent. 148, 161. 2 Lev. 13. 2 Saund. 367. 2 Keb. 798, 819, 833, 839.

viz. 12 *E.* 3. *Fitzh. Assise* 86. is contrary, as appears by the *Antitheſis* there uſed. And *Latch.* 274. *Wooton* verſus *Edwyn* is without the words *durante termino*; and agreeing with this judgment is *Latch* 99. *Sury* verſus *Brown.*

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* P. 214. * Term. Hill. 23 & 24 Car. 2. B. R.

Mandamus. 1 Vent. 187. 2 Keb. 871.

MR. *John Amherſt* of *Gray's Inn* being owner of ground adjoining to *Newgate* market in *London*, had ſome of his ſaid ground laid to the ſaid market for the enlarging thereof, and thereupon according to the acts of parliament of 19 *Car.* 2. *cap.* 8. and 22 *Car.* 2. prayed ſatisfaction from the city, and had a jury impanelled, who gave him five hundred pounds and upwards, and upon that verdict the mayor and aldermen refuſed to enter up judgment; and thereupon Mr. *Amherſt* prayed a *Mandamus* to make them give judgment; and it was granted.

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* P. 215. * Term. Paſch. 24 Car. 2. B. R.

Chimin. 3 Salk. 183.

NOTA. Upon an indictment againſt *Houghton* of *Somerſetſhire*, for ſtopping a way, it was declared to be the courſe of this court, that the offender is admitted to a fine upon his ſubmiſſion before verdict, if there be a certificate that the way is repaired. But if the party be convicted by verdict, ſuch certificate will not ſerve, but the party ought to cauſe a *Conſtat* to iſſue out to the ſheriff, who ought to return, that the way is repaired, becauſe the verdict, which is a record, ought to be anſwered with matter of record.

Term.

* Term. Mich. 24 Car. 2. B. R. * P. 216.

THE lady *Broughton*, keeper of the Gate-houſe priſon in *Weſtminſter*, was informed againſt; and upon Not guilty pleaded, ſhe was found guilty; and her crime was extortion of fees, and hard uſage of the priſoners in a moſt barbarous manner; and after ſhe had by her counſel moved in arreſt of judgment, and could not prevail, ſhe had judgment given againſt her, *viz.* ſhe was fined one hundred marks, removed from her office, and the cuſtody of the priſon was at preſent delivered to the ſheriff of *Middleſex*, till the dean and chapter ſhould farther order the ſame, *ſalvo jure cujuſlibet*. Extortion. 2 Lev. 71. 3 Keb. 32, 89, 92, 106, 151.

Memorandum, This laſt vacation juſtice *Morton* died, and all this term his place was vacant.

* Term. Hill. 24 & 25 Car. 2. B. R. * P. 217.

THIS laſt vacation juſtice *Archer* was amoved from ſitting in the court of *Common Pleas*, *pro quibuſdam cauſis mihi incognitis*; but the judge having his patent to be judge *quamdiu ſe bene geſſerit*, refuſed to ſurrender his patent without a *Scire facias*, and continued juſtice of that court, though prohibited to ſit there, and in his place ſir *William Ellis*, knight, was ſworn.

Alſo the day before this term began, juſtice *Wild* was removed out of the court of Common Pleas into this court, and ſworn privately; and in his room baron *Windham* was ſworn

ſworn to be one of the judges of the Common Pleas, and in his place ſir *Edward Thurland*, knight, of the *Inner Temple*, the ſecond day of this term was made ſerjeant at law, having his coif put on in the Treaſury, and immediately ſworn one of the barons of the *Exchequer*.

Alſo this vacation ſir *Orlando Bridgman*, knight and baronet, was removed from being lord keeper, and in his place *Anthony* earl of *Shaftſbury*, was made lord high chancellor of *England*.

Alſo this laſt vacation *Francis Wimington*, utter barriſter of the *Middle Temple*, was knighted, and made ſolicitor to the duke of *York*, and the firſt day of this term was called within the bar.

Serjeant *Baldwin* was made king's ſerjeant.

Blacket *verſus* Lumley.

Error.
1 Vent. 240.
3 Keb. 103, 116.

A WRIT of error to reverſe a judgment given in the court of the royal manor of *Hexham* in *Northumberland*. In a *Replevin* the defendant avows for damage-feaſant; the plaintiff pleads in bar to the avowry, that *Fenwick* was ſeiſed in fee of the manor of *Fallowfield*, and that he and all thoſe whoſe eſtate, &c. have uſed time out of mind to have common of paſture *in loco in quo*, &c. for all his farmers and copyholders; and that he is a copyholder, and held of the ſaid manor, and juſtifies for com-
* P. 218. mon belonging * thereunto. The avowant replies and traverſes the preſcription, and it is found againſt him; and judgment for the plaintiff; and now the errors aſſigned were, The *Venire facias* is ill awarded, for that it is *præceptum eſt per Seneſchallum Cur. præd. quod Ven. fac. duodecim tam de vicineto de Hexam quam de vicineto Manerii de Fallowfield infra juriſdictionem*, &c. *quia nec*, &c. *quod ſint hic ad horam ſecundam poſt meridiem hujus diei.*

1. 'Tis not *per Cur.* nor *per Seneſchallum in Cur.* and it may be it was out of court, and proceſs in private juriſdictions ſhall not be taken by intendment; and of this opinion were *Twiſden* and *Wild*; but *Hale* chief juſtice *contra*, becauſe 'tis returned the ſame day; and the court ſhall be preſumed to be continued the whole day.

2. The manor of *Fallowfield* is not laid to be within the juriſdiction, as it ought to be, in the pleading of the preſcription; and the ſaying in the awarding of the *Venire facias* that 'tis ſo is not ſufficient. And to this opinion *Hale* agreed.

3. The

3. The *quia nec* for *qui nec* is not good; but they ought to have put it at large, and not as 'tis in *B. R.* And *quia nec* is nonſenſe. And *Twiſden* and *Wild* allowed this exception; but *Hale* chief juſtice did not; but upon the conſideration of all the exceptions, judgment was reverſed, and ſo pronounced.

Welch *verſus* Bell.

TRESPASS was brought againſt four in this court, who appear, and judgment againſt them all, and they bring a writ of error here of a judgment given *coram vobis*, and aſſign for error, that one of the defendants, being an infant, appeared by attorney, whereas he ought to have appeared by his guardian; *& hoc parati ſunt verificare prout Curia conſideraverit*; and the defendant in the writ of error pleads *In nullo eſt erratum*, and now ſhews that here is no error aſſigned, becauſe they conclude, *Et hoc parati ſunt verificare prout Cur. conſideraverit*, whereas they ought to have concluded to the country, according to *Yelver.* 58. *King* verſus *Goſper* and *Shire*; *and* 1 *Bulſt.* 37. *Barker's* caſe. But by *Hale* chief juſtice, it is well enough, for *parati ſunt verificare prout Cur.* and without *prout Cur.* are all one. But it was adjourned.

Diſtreſs. 2 Danv. Ab. 649. p. 12. 1 Vent. 36. 2 Lev. 73. 1 Siderf. 422, 440. 2 Keb. 529, 595, 631. 3 Keb. 105, 128, 165, 198, 222.

* An information was brought in this court againſt *Baker*, a carrier, for putting in above five horſes in his waggon, contrary to the ſtatute of 22 *Car.* 2. and upon *Non culp.* pleaded, a verdict was found againſt him. And *Pollexfen* moved in arreſt of judgment, becauſe the ſtatute gives other remedy for the penalty, *viz.* Diſtreſs, and doth not give an information.

* P. 219.

Information. 2 Keb. 75, 94, 106, 275.

Hale, chief juſtice. It ſeems the puniſhment was intended to be inflicted *flagranti crimine*, and if an information would lie, the king may bring it any time within two years. But it was adjourned.

Whaley *verſus* Tankred. *Ejectment.*

UPON Not guilty pleaded, a ſpecial verdict was found, wherein the caſe was ſhortly this; *Charles Meynel*, tenant for 99 years, if he live ſo long, the remainder to *Edmund Meynel* in tail, 14 *Oct.* 1655. infeoffs the defendant and his heirs; and *Hill.* 1656. levies a fine *ſur conuſance de droit come ceo, &c.* with proclamations, to the

Non-Claim. 2 Lev. 52. 1 Vent. 241. 1 Keb. 30, 37, 110.

the ſame *Charles Tankred*, to the uſe of him and his heirs, who entered accordingly. 28 *Auguſt* 1661. *Edmund Meynel* died. *Charles Meynel*, 18 *March* 1664. died; 10 *April* 23 *Car.* 2. the leſſor of the plaintiff, being eldeſt ſon and heir of the ſaid *Edmund Meynel* entered, and whether his entry was lawful, was the queſtion; wherein the ſingle point was, Whether *Edmund Meynel* ought to have entered within five years after the fine levied, or ſhall have other five years after the death of *Charles Meynel*. And reſolved *per totam Cur.* He ſhall have five years after the expiration of *Charles* his eſtate by his death; and that there is no difference between the leſſee for life and leſſee for years, as to this point, contrary to the opinion of the lord *Coke*, in *Prodger*'s caſe, 9 *Co.* 106. and of chief juſtice *Catlin*, *Plow.* 374. *a.* and judgment was given for the plaintiff.

Prohibition.

Sir *Drayner Maſſingberd*, knight, was ſued in the eccleſiaſtical court by *Cutberd*, by the name of ſir *Drayner Maſſingberd*, knight and baronet; and 'tis pleaded there, that he is only knight and not baronet; and the court there diſallowed the plea, and proceeded to excommunication; and *Darwyn* for ſir *Drayner* moved for a prohibition; and it was granted.

* P. 220.

* Mildway *verſus* Caſe.

Debt.
1 Vent. 233.
3 Keb. 111, 164.

DEBT upon an obligation by the plaintiff as ſheriff, conditioned for the appearance of *White* in *B. R. die Sabbati proximo poſt quindenam Sancti Martini ad reſpondendum Willielmo Gulſton in placito debiti*. Upon demanding oyer of the condition, The defendant pleads, that the ſaid *Gulſton* ſued forth a *latitat* returnable the ſame day againſt the ſaid *White*, *ad reſpondendum* the ſaid *Gulſton in placito tranſgreſſionis ac etiam debiti*, and pleads the ſtatute of 23 *H.* 6. And the plaintiff demurred, and the queſtion was, Whether the variance between the condition of the obligation and the writ, vitiates the obligation by that ſtatute; And it ſeemed to *Hale* chief juſtice, that it is not the ſame writ mentioned in the condition. And therefore for the defendant. But it was adjourned.

Mors

Mors *verſus* Slue. *Action on the Caſe.*

THE plaintiff declares againſt the defendant for not ſafe keeping goods delivered to his cuſtody. Upon Not guilty pleaded, the jury found a ſpecial verdict, *viz.* That the defendant was maſter of a ſhip which lay in the river of *Thames*, near *St. Katherine's*, that the plaintiff delivered goods to him to tranſport. That the defendant received his ſalary from the owner of the ſhip; that there being three men and a boy in the ſaid ſhip, perſons unknown, about eleven o'clock in the night came on board with a pretended warrant to ſearch for felons, and ſeiſed upon the perſons in the ſhip, and took away the goods; and whether the defendant was guilty was the queſtion, *viz.* Whether the maſter or owner of the ſhip ſhould anſwer theſe goods; and reſolved for the plaintiff. Caſe. 1 Danv. Abr. 12. p. 6. 1 Vent. 190, 238. 2 Lev. 69. 1 Mod. 85. 2 Keb. 866. 3 Keb. 72, 112, 135.

* Metwyn *againſt* The Hundred of Iſtleworth. * P. 221.

UPON the ſtatute of *Wincheſter*. The defendant pleads, *quod ceperunt quendam Richard' Dudley*, being one of the perſons who robbed the plaintiff; and upon this iſſue was joined, and the jury find a ſpecial verdict, *viz.* That the ſaid *Richard Dudley* being accidentally, or upon ſome other occaſion, in the preſence of ſir *Philip Howard*, was there charged by ſir *Joſeph Aſh* to be one of the robbers, and the ſaid *Dudley* being in the preſence of ſir *Philip Howard*, a juſtice of peace of the ſaid county of *Middleſex*, the ſaid ſir *Philip Howard* did undertake for him, that he ſhould appear at the next ſeſſions. That the ſaid *Dudley* at the next ſeſſions did come into the ſeſſions yard, but did not render himſelf up to the court; And whether the ſaid *Dudley* being in the preſence of the juſtice of peace, and charged as aforeſaid, was a taking within the ſtatute of 27 *Eliz. cap.* 13. was the queſtion by the jury. And it was adjudged for the defendant, that this charging of the robber was a taking within the ſtatute. Hue and Cry. 2 Lev. 4. 1 Vent. 118, 235. 2 Keb. 760. 3 Keb. 115.

Oſeley *verſus* Sir George Warberton.

SIR *George Warberton* ſeiſed of two manors, to one of which he uſed to receive a rent iſſuing out a tenement held of one of them as he conceived, but of which he could not diſcern, and becauſe the tenant refuſed to pay the ſame, Prohibition.

ſame, and ſir *George* had no deed to ſhew for the ſaid rent, he exhibited a bill to the chamberlaid of *Cheſter* againſt *Oſeley* the tenant to diſcover the deed. To this *Oſeley* anſwered that he had no deed concerning the ſaid rent, and upon that anſwer the court at *Cheſter* ordered a trial at law, to try to which of the ſaid manors the ſaid rent did belong, and was payable. And *Jones* moved for a prohibition, becauſe a court of equity cannot charge the inheritance of a man's land with a rent; and it was granted.

• P. 222.

• Winton *verſus* Pinkney. *Debt for Rent.*

Debt.
2 Danv. Abr. 501. p. 13.
2 Lev. 80.
1 Vent. 242.
3 Keb. 131, 137.

LESSEE for life makes a leaſe for years, which leſſee for years ſurrenders to the reverſioner, rendering rent; and reſolved for the plaintiff, becauſe 'tis a duty by way of contract.

Moſedel *verſus* Middleton. *Covenant.*

Covenant.
1 Vent. 237.
3 Keb. 133.

THE plaintiff declares, that the defendant covenanted for the true impriſonment of *J. S.* who eſcaped, and that thereupon the plaintiff was ſued, and was forced to pay the debt. The defendant pleaded the ſtatute of 8 *H.* 6. and that the covenant was for eaſe and favour of *J. S.* The plaintiff replied, that the ſaid covenant was entered into for better ſecurity, *Abſq. hoc*, that it was for eaſe and favour; and the defendant demurred, and judgment was given for the defendant, *niſi*, becauſe there was a covenant to pay chamber-rent, *&c.* which in itſelf is for eaſe and favour.

* Term. Paſch. 25 Car. 2. B. R. † P. 223.

Young *verſus* Cage.

DEBT upon a bond. Judgment was had by default by the plaintiff as executor; and the attorney had left out, *Et profert hic in Cur. Literas teſtamentarias*; but the plaintiff is called executor in the declaration; and the defendant having brought a writ of error, *Simpſon* moved to have the record amended in this particular, and to have thoſe words inſerted. But it was denied, becauſe whether the plaintiff was executor or not, is matter of fact, and 'tis no reaſon to allow that to be true, which may be otherwiſe, without any proof but the plaintiff's own ſuggeſtion. Amendment. 1 Danv. Abr. 337. p. 46. 3 Keb. 138.

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* Term. Mich. 25 Car. 2. B. R. * P. 224.

Syms *verſus* Sym. Trin. 25 Car. 2. Rot. 672.

DEBT for rent. Upon ſpecial pleading the caſe was this; leſſee for years dies inteſtate. In *May* 1669. adminiſtration was granted of his goods to *A.* who aſſigns this term to *B.* who aſſigns to *C.* who ſurrenders to the reverſioner; afterwards a third perſon cites the adminiſtrator before the ordinary to repeal the adminiſtration, who confirms the ſame; then the third perſon appeals from that ſentence to the dean of the arches, where the ſentence is avoided, and adminiſtration granted to the appellant; and whether this avoidance of the ſentence ſhall void all acts done by the adminiſtrator before the action, was the queſtion. And reſolved by *Hale* chief juſtice, *Rainsford* and *Wild*, Executor. 2 Lev. 90. 3 Keb. 206.

Wild, absente Twisden, That it shall not; but is the same in effect with *Packman*'s case; and judgment was given for the plaintiff.

Dinsdale *versus* Iles.

Estate.
3 Danv. Ab. 234. p. 9.
1 Vent. 247.
2 Lev. 88.
3 Keb. 166, 207.

TRESPASS for taking of goods. The defendant pleads that he let the land where the taking is supposed to be, to *Iles* at will, rendering rent at *May-day*, and the feast of St. *Martin* the bishop, in winter; and for rent arrear at *Martinmas* 21 *Car.* 2. the defendant justifies the taking the goods as a distress. The plaintiff replies, and confesses the lease; but farther, That before the rent became due, *viz.* in *August* 21 *Car.* 2. the defendant let the same land to *Iles* for years, rendering rent, who entered and was possessed; and so the lease at will to *Iles* was determined. The defendant rejoins, that in the said lease it was agreed, that the lessee should not enter till after *Martinmas, absque hoc*, that he entered *prout*. The plaintiff surrejoins, that he leased *prout, absque hoc*, that it was so agreed. And the * defendant demurs; and adjudged for the plaintiff, because the lease for years was a determination of the estate at will; and though upon the whole matter, and by virtue of the agreement it was a lease by computation from *August*, and in point of interest but from *Martinmas*; yet as this case is pleaded, where the plaintiff acknowledges the lease to commence in interest in *August*, the estate at will was determined.

* P. 225.

Fosset *versus* Francklin. Debt upon 2 *E.* 6. for Tithes.

Tithes.
2 Danv. Ab. 620. p. 5.
3 Keb. 208, 217.

THE lands were parcel of the possession of the prior of St. *John of Jerusalem*, and came to the crown by 32 *H.* 8. *cap.* 24. and parcel of St. *John Wood* in the parish of *Marybone* and *Hampstead*; and whether they are discharged from payment of tithes, by 32 *H.* 8. *cap.* 24. was the question upon a trial at bar, and a special verdict found thereupon. But it seemed to *Hale* chief justice, that they shall not pay tithes, by reason of the word *(Privileges,)* And in *Whitty* versus *Weston, Bridgman* 32. *Latch.* 89. *Godbolt* 392. *pl.* 478. the court was divided. But 2 *Cro.* 57. *Moor* 913. *pl.* 1291. *Cornwallis* versus *Spurling*, in debt upon 2 *E.* 6. judgment was given that the lands are tithable; and so in a prohibition, 2 *Brownl.* & 20. *Urrey* versus *Bowen*.

Adjournatur.

Adjournatur. But *Dyer* 277. *b. pl.* 60. is, that they are not tithable. And judgment was afterwards given for the defendant; and reſolved the lands are not tithable.

The Biſhop of Exon' *and* Maſter his Vicar General *verſus* Star.

DEBT upon an obligation of 20*l.* The defendant demands oyer of the condition, which is, *That whereas the defendant ſtandeth excommunicated in the eccleſiaſtical court, and is to be abſoiled, If therefore he do abide by and ſtand to* omnibus mandatis Eccleſiæ, *that then, &c.* The defendant pleads, that he gave this bond to be freed from excommunication, and that the ſame is void in law, and ſo he ought not to be impleaded thereupon. The plaintiff demurs generally. *Maſter* for the plaintiff, The ſingle queſtion is, Whether a bond given for caution be good? * It is clear, that before an excommunicate perſon be abſoiled, he muſt give caution, and to compel the ordinary to take the ſame a writ lies at the common law, *De Cautione admittenda, F. N. B.* 63. *c.* which muſt be *idonea Cautio & ad parend' mandatis Eccleſiæ, Regiſt. Orig.* 66 *and* 67. And an action upon the caſe lies againſt the biſhop for not taking ſuch caution, if the perſon excommunicated requires it, *Co.* 2 *Inſt.* 623. or the biſhop may be indicted, *ibid.* But what is *Idonea Cautio* is left to the ſpiritual court to determine; and our law is not judge thereof. And there are three ſorts of cautions, 1. *Juratoria,* when the party is poor and can give no other ſecurity. 2. *Fide-juſſoria,* by bond or other ſecurity. 3. *Pignoratitia,* by pledge, as plate, money or other goods; and this is mentioned, *Regiſt.* 66. *a.* 67. *b.* It is called ſecurity, *Flet. lib.* 6. *cap.* 45. *Page* 438. *& Canon Aug.* 354. *Caution upon Marriage.* 2. This caution muſt be the act of the party excommunicate, he muſt tender it, and the judge is not bound to require it. 3. This caution by an obligation is more for the eaſe of the party than a pledge. 4. 'Tis the conſtant practice and uſe of the eccleſiaſtical court. 'Tis not void by the common law, becauſe it is to do a lawful thing. It is not void by ſtatute law, nor within 23 *H.* 6. *cap.* 10. and 5 *Eliz. cap.* 23. ſaves the right and juriſdiction of the biſhops.

Excommunication. 3 Danv. 279. p. 1. 1 Vent. 166. 2 Lev. 36. 2 Keb. 814, 836, 848, 873. 3 Keb. 219, 285.

* P. 226.

Object. 1 *Bulſt.* 122.

Reſp. 2 *Inſt.* 615. If the cauſe be of eccleſiaſtical cognizance, the temporal court will not intermeddle therewith; and

and in *Homine Replegiando*, the party muſt put in pledges, and find *ſufficientem cautionem*. *F. N. B.* 66.

Jones for the defendant. He made three points. 1. If any bond ought to be given to the biſhop. 2. If this bond be good in law. 3. Admit it not to be good, then whether it may be avoided by plea.

1. There ought not any bond to be given to the biſhop. True it is *F. N. B.* 63. ſpeaks of caution, but not of ſecurity by bond; and *Regiſt.* 66 and 67. deſcribes the caution to be *pignoratitia*; and the reaſon is, becauſe the caution is controllable by the ſucceſſor, and not by the executors of the biſhop, as it will be in caſe of a bond.

2. This bond is not good, becauſe the ſame ought to be given to the biſhop, or to his ſurrogate; and here it is given to the biſhop and his vicar general.

And as to the *objection*, That it is the uſage and practice, 'Tis anſwered. Such uſage never came judicially in queſtion.

* P. 227. * This bond is void by the common law, *Moor* 864. *pl.* 1191. *Slowny* verſus *Elbridge*, in caſe of diſtribution, *Stile* 456. *Davies* verſus *Mathews*. And here it will be a vexation to the people to have bonds put in ſuit againſt them.

Hale chief juſtice. The caſe in *Bulſtr.* is by the whole court, that ſuch bond is not good; and the caſe of diſtribution hath been variouſly ruled, till the late ſtatute.

Wild juſtice. Such bonds have been frequent, and have been allowed in *C. B.*

Hale chief juſtice. A bond conditioned to perform a by-law hath been ruled naught. *Adjournatur.*

King *verſus* Welby.

Prohibition. 3 Keb. 221.

THE plaintiff had a judgment at law againſt the defendant, who exhibited his bill in chancery to be relieved againſt this judgment, and the plaintiff pleaded this judgment, and over-ruled. And the plaintiff by *Sanders* moved for a prohibition, grounding his ſuggeſtion upon the ſtatute of 4 *H.* 4. *cap.* 23. *Et adjournatur.*

And afterwards *Hale* chief juſtice directed, that the plaintiff ſhould move the court of chancery to have the plea ſet down again to be heard, and when it ſhould be over-ruled again, then the court would conſider whether a prohibition ſhould be granted.

Wright

Wright *verſus* Woodhouſe.

TRESPASS for entering his houſe, and taking a cup of ſilver. The defendant juſtifies by virtue of a clauſe in the act of 16 *Car.* 2. *cap.* 2. *That if any perſon occupying any hearth or ſtove, chargeable to his Majeſty, ſhall leave any houſe before any of the half-yearly feaſts, whereon the ſame is appointed to be paid; the next occupier thereof ſhall be chargeable with the ſame for the ſaid half year*, and that the plaintiff was next occupier to him who was in arrear. The plaintiff demurs; and adjudged for the defendant; And now *Winnington* moved for the defendant to have treble coſts, according to the act of 14 *Car.* 2. *cap.* 10. which gives treble coſts againſt any plaintiff, who ſhall have judgment againſt him in any action brought for acting by that act; and the court doubted whether this act * of 14 *Car.* 2. be a continuation of 16 *Car.* 2. as to this particular. *Et adjournatur.*

Coſts. 3 Keb. 141, 228.

* P. 228.

King *verſus* ———

TRESPASS *quare clauſum fregit pedibus ambulando & proſternere ſes fences, continuando tranſgreſſion. præd.* from ſuch a day to ſuch a day, *ad damnum, &c.* And after verdict, Upon *Non. eulp.* it was moved in arreſt of judgment, becauſe there can be no *continuando* in breaking of fences. As if I bring an action of treſpaſs for taking my horſe, and uſing him twenty days; I cannot lay it with a *continuando.* So for cutting of trees. *Mich.* 20 *H.* 7. 3. *pl.* 7. 2 *Roll.* 549. *pl.* 5. *Et adjournatur.*

Treſpaſs. 3 Keb. 228, 250.

Pybus *verſus* Mitford. *Ejectment in* Northumberland.

Intr. Trin. 24 Car. 2. Rot. 703. B. R.

OF the demiſe of *Gray* and his wife. Upon Not guilty, the jury found a ſpecial verdict, That *Michael Mitford* was ſeiſed in fee, and had iſſue two ſons, *viz. Robert* by his firſt wife, and *Ralph* by his ſecond wife, whoſe name was *Jane*, and ſo being ſeiſed 23 *Jan.* 21 *Jac.* by indenture covenanted to ſtand ſeiſed of the lands in the declaration mentioned after the date of the indenture, to the uſe of the heirs males of his body begotten on the body of his ſaid wife

Eſtate. 2 Danv. Ab. 556. p. 2. 3 Danv. Ab. 158. p. 8. 2 Lev. 75. 1 Vent. 372. 1 Mod. 121, 159. 3 Keb. 129, 239, 316, 338.

wife *Jane*, with remainders to his own right heirs, and dies. 16 *Car.* 1. *Robert* enters and levies a fine to the uſe of himſelf and *Mary* his wife, and the heirs of their bodies, and dies without iſſue. *Mary* marries the leſſor of the plaintiff; the defendant *Ralph* enters, and the jury concluded, That if any uſe did ariſe to *Ralph* by the ſaid indenture of 21 *Jac.* then they find for the defendant, otherwiſe for the plaintiff.

Jones ſolicitor general for the plaintiff. That no uſe ariſes to the iſſue of the ſecond wife. Here are two points. 1. If by this covenant an eſtate be raiſed by way of future uſe, to commence after the death of *Michael* the covenantor. 2. Admitting that no eſtate do ariſe, whether an eſtate by implication does ariſe to the heirs of the ſecond wife. 1. No eſtate ariſes here as a future uſe, for theſe reaſons.

* P. 229. * 1. An uſe may ariſe *in futuro* to a perſon *in eſſe*; but it cannot be limited to one in being, to commence after the death of the covenantor, becauſe a covenant ſhall not bind the heir, where the anceſtor is not bound, and *(ergo)* a covenant that land ſhall remain to *A.* after my death, doth not raiſe an uſe. 21 *H.* 7. 18. *pl.* 30. *Dyer* 55. *a. pl.* 3. *Hob.* 313. 2. Whether this ſhall amount to a covenant to ſtand ſeiſed to the uſe of him and the heirs of his body; and I hold it doth not. 1. Here appeareth no intent to charge the eſtate in the life-time of the covenantor. Suppoſe I covenant, that after the death of *J. S.* I will ſtand ſeiſed to the uſe of *J. D.* that is by way of future uſe.

Object. 1 *Co.* 129. *a.* Covenant, that after his death his ſon ſhall have his land, raiſes a uſe to the ſon.

Reſp. That caſe is only alledged by counſel, and not by the judges. And *Winch* 61. *Buckley* and *Simond*'s caſe is contrary, and ſo is *Mitford*'s caſe. *Coke on Litt.* 22. *b.* And a man cannot make his right heirs purchaſors.

Levinz for the defendant. 1. Here is a good uſe raiſed to *Michael Mitford* the father by implication, *viz.* To him for life, the remainder to the heirs of his body; and this appears by the lord *Paget*'s caſe, 1 *Co.* 154. *a.* Where the eſtate to *Farmer*, and others, during the life of the lord *Paget* being void, and the other eſtates not being to commence till after his death; the lord *Paget* was reſolved to have an eſtate for his life by implication. 1 *Anderſon* 263. *pl.* 270. *Moor* 284. *pl.* 437. *Fenwick* verſus *Mitford.* 1 *Anderſon* 288. *pl.* 297. 1 *Leon.* 182. *pl.* 256. 1 *Leon.* 101. *pl.* 133. *Allen* verſus *Palmer.* Surrender to the uſe of the right heirs of the copyholder; and it is frequent for uſes to ariſe by implication, 2 *Leon.* 218. *pl.* 275. *Humphreton*'s

phreton's case, The mind of the party doth direct the estate. 1 *Anderson* 245. *pl.* 258.

2. Admit that there cannot be such an use by implication; yet this is a good use to commence after his death, as a new springing use.

Object. This covenant shall operate by way of contract.

Resp. It may do so in a subject proper for it; but here the land is bound by it. As to the case of *Dyer* 55. *a.* it is not a covenant to stand seised; for if it had been so, an use would have arisen. 2 *Roll.* 788. *pl.* 1. *Buckler* versus *Simonds*. And here the covenant would be void if it did not raise a use; and springing uses frequently happen upon a contingent. 1 *Co.* 155. *b.*

* *Hale* chief justice. If a man covenant to stand seised after his death, it will raise a use to commence after his death, as well as during his life; for though the heir is not bound where the ancestor is not bound, yet land may be charged in the hands of the heir by the ancestor, and a use doth charge the land; but there may be improper words to charge the land, as the case of *H.* 7. and *Dyer* 55. is. * P. 230.

If *H.* covenants to stand seised after his death to the use of *J. D.* he hath the fee till his death. *Paget*'s case comes not home to this case, because there was only an estate for life drawn out, and no contingent use. Here are clauses in the deed, which shew that it was never intended that there should be an immediate estate upon the heir. *Adjournatur.*

Winnington for the plaintiff. Here are three points. 1. If here be a contingent use raised? *And I hold there is not.* 2. Whether any estate arises to the covenantor by implication? *And I hold there doth not.* 3. Whether the issue by the second venter shall not take by purchase? *And I hold he shall.*

1. A future use may be raised upon a contingent. *Plowd.* 301. *Sherington* versus *Pledal*, & *in futuro*. 2. Here is no estate-tail vested in the covenantor, because no intent of the parties so to have it; but by implication he hath an estate for his life. The covenantor is in of his ancient seisin till the use arise, and not as in case where a use arises by transmutation of possession; and here is a new use raised, and therefore *Michael* could not be in of an estate-tail executed. 3. *Ralph* shall not take as a purchasor, for here is a description of the person, rather than a limitation of the estate.

Saunders for the defendant. *Ralph* here shall take *quasi* by discent. *Adjournatur*. And judgment given for the defendant.

Bradley *verſus* Hutchinſon, *Executor.*

Amendment.

A SCIRE FACIAS upon a judgment in debt. The defendant pleads *pleinment Adminiſtre* generally; and the plaintiff demurs ſpecially for that cauſe.

And *Jones* ſolicitor general moved to amend the plea, becauſe the defendant ought to have pleaded ſpecially.

* P. 231. In a *Scire fac.* upon a judgment this plea was adjudged naught in B. R. *Paſch.* 1659. by Glyn ch. juſt.

* *Hale* chief juſtice. The judgment binds the goods, and therefore it ſhall be preſumed that the ſame were rightfully adminiſtered.

Twiſden juſtice. It hath been adjudged a good plea; but let the plea be amended, if the defendant will.

Okeover *verſus* Overbury. *Error, Fine in* C. B.

Error. 1 Vent. 252. 3 Keb. 259.

IN a writ of error to reverſe a fine, infancy is aſſigned for error, and a *Scire facias* iſſues to *Overbury*, tertenant and conuſee, who pleads *In nullo eſt erratum.*

Hale chief juſtice. When error in fact is well aſſigned for error, *In nullo eſt erratum* amounts to a confeſſion of the fact; as if infancy be aſſigned, the plaintiff cannot plead *In nullo eſt erratum*, becauſe by it he confeſſeth the infancy, but he ought to take iſſue; but if the party aſſign for error, that the court did not ſit, or that the defendant did not appear, which aſſignments are of matters of fact, but not well made, there *In nullo eſt erratum* amounts to a demurrer.

Captain *Waters* being a captain in the foot guards, and his ſerjeant reſcued one of his ſoldiers of his company from the cuſtody of the ſheriffs of *London*, and for that offence an information was exhibited againſt them, and they came into court and confeſſed the fact; and upon that confeſſion judgment was given againſt them, and the captain was fined 100*l.* and the ſerjeant 50*l.* and impriſonment awarded againſt them until payment of the ſame.

Southam *verſus* Allen, *for Words.*

Words.

THE plaintiff is a keeper of livery ſtables and an inn at the *Belſavage*; and the defendant had other ſtables for the ſame purpoſe, in the ſame yard. A ſtranger comes with a waggon into the yard, and demands of the defendant,

defendant, which is *Belſavage-Inn?* the defendant replied, *This is* Belſavage-Inn, *deal not with the plaintiff, for he is broke, and there is neither entertainment for man or horſe*; and after verdict for the plaintiff, and great damages, judgment was given for the plaintiff after much debate.

* Baker *verſus* Bulſtrode. * P. 232.

DEBT upon an obligation, upon condition that the defendant ſhall well and ſufficiently execute, to the ſatisfaction of the plaintiff's counſel, a releaſe within ſeven days after a decree of a moiety of the money decreed. The defendant pleads, that the plaintiff did not tender any releaſe. The plaintiff demurs. Condition. 2 Danv. 39. p. 33. 2 Lev. 95. 1 Vent. 255. 1 Mod. 104. 3 Keb. 273.

Hale chief juſtice. If advice had been neceſſary, then the plaintiff muſt have done the firſt act, but now it is at the peril of the defendant, that the releaſe be to the ſatisfaction of the plaintiff's counſel; and judgment was given for the plaintiff.

Prideaux *verſus* Warne. *Replevin.*

FOR taking of a ſail of a ſhip; the defendant avows the taking, for that he is ſeiſed of the manor of *Padſtow*, within which there is a common key, extending from ſuch a place to ſuch a place, for the unlading of ſalt, and that he and all thoſe, &c. have uſed to repair the ſaid key, and have kept a buſhel for meaſuring of ſalt, and that they have had of every ſhip arriving there, laden with ſalt, one buſhel of ſalt; and that the plaintiff had a ſhip arrived at the key laden with ſalt; and becauſe a buſhel of ſalt was not paid according to the preſcription, he avows the taking of the ſaid ſail. The plaintiff pleads in bar of this avowry, that the river upon which this key is pretended, is a great rivea of ten miles breadth, and that the key extends but half a mile, and that the ſhip arrived ſeven miles diſtant, *Abſq; hoc*, that the ſaid ſhip did arrive at the key within the ſaid manor. The defendant demurred. Cuſtom. 2 Danv. Ab. 428. p. 6. 2 Lev. 96. 1 Mod. 104. 3 Keb. 249. 275.

Pollexfen for the avowant. 1. Whether this be a good preſcription without keeping a buſhel, or repairing the key? and it ſeems it is. 21 *H.* 7. 16. *Br. Preſcription* 92. 3 *Cro.* 710. *Dyer* 352. *b.* And the not coming up to the key makes nothing againſt the avowant, becauſe he can come up if he pleaſe. *Co.* 2 *Inſt.* 222. *Murage. Roll. Preſcription* 265. for *Dublin, Tronage*, 1 *Leon.* 231.

Object. 'Tis out of the manor.

Resp. He may claim such a privilege in another manor.

* P. 233. * 2. The taking of the sail is lawful, because, 1. Though it is not the goods of him who ought to pay the duty; yet it is well enough, for that is not necessary. *Pasch.* 21 *Car.* 2. *Welch* versus *Bell.* 1 *Roll.* 666. *Agard* versus *Lisle.*

Courtney contra, for the plaintiff. It is no good prescription, because it hath no good foundation nor meritorious consideration. For 1. Reparation of the key extends only to ships lying at the same to lade and unlade; and the keeping of a bushel is no cause, no more than the case of aulnage, 1 *H.* 4. 14. *Dyer* 117. 2. This is a duty from the merchant, not from the ship. 3. The sail is an unreasonable distress, because it disables the whole ship.

Hale chief justice. This prescription is only for a wharf, not for a port, and here ought to be reasonable recompence for the prescription. For *Magna Charta* says, *Omnes Mercatores peregrinos, &c.* without unreasonable toll; and he who hath a port ought to find and provide weights and measures, and other things. And in this case the avowant may as well prescribe to the confines of *France,* and therefore it is not a good prescription; as the case of the Belman of *Litchfield, More*; And it is not said what salt was in the ship, and there may not be above two bushels; and therefore judgment was given for the plaintiff.

Taylor *versus* Holmes. *Error in* Northampton.

Actions. 2 Lev. 101. 3 Keb. 264, 276, 296, 302, 335.

ASSUMPSIT and *Trover* in one declaration. The defendant pleads as to the *Assumpsit, Non Assumpsit,* and as to the *Trover, Non Culp.* The jury find, as to the *Assumpsit* for the plaintiff; and as to the *Trover* for the defendant, and the joining of these two actions in one declaration is assigned for error; and adjourned; but it seemeth not to be good.

Lomax *versus* Armourer. *Error in* Newcastle.

Error. 3 Danv. Abr. 94. p. 11. 1 Lev. 98, 123. 1 Vent. 267. 3 Keb. 277, 326, 421.

DOWER in *Newcastle* by plaint there. And the error assigned is, That freehold is not pleadable without original writ. *Brit.* 128. *b. F. N. B.* 77. *b. Co. Inst.* 2. 282, 311. *Intr.* 429. 3 *Cr.* 101. *Marshal* versus *Hobs,* as to fines, * 44 *E.* 3. 28. 37. 50 *Ass.* 9. But fines and real actions differ, for a fine is an amicable suit, *& cont.* 3 *Cro.* 114, 116. *Owen* 93. *Et adjournatur.*

* P. 234.

Bellew

Bellew and *Norman*, *Frenchmen*, were condemned for clipping, and judgment given by the ſecond judge, only to be drawn and hanged, *contra al Coke*. But by all the juſtices, this offence of clipping is made treaſon by the ſtatute of 3 *H.* 5. *cap.* 6. and is of the ſame nature with coining, the puniſhment and judgment whereof is only drawing and hanging, becauſe ſo the judgment was at the common law; and the ſtatute of 25 *E.* 3. *cap.* 2. which declares what ſhall be treaſon, doth not appoint the judgment; and by the common law the judgment for coining was drawing and hanging for a man, and burning for a woman. *Fleta*, *l.* 1. *cap.* 22. *Vide Dyer* 230. *b. pl.* 55.

Treaſon.
2 Lev. 98.
1 Vent. 254.
3 Keb. 278.
Co. 3 Inſt. 17.
1 Cr. 383. *Morgan's* caſe.

Term.

* P. 235. * Term. Mich. 26 Car. 2. B. R.

Sir *Matthew Hale*, Chief Juſtice.
Sir *Thomas Twiſden*,
Sir *Richard Rainsford*, and } Juſtices.
Sir *William Wild*,

Dunkin *verſus* Frances Mun *Widow, Adminiſtratrix with the Will annexed of* Quarles Brown *during the Minority of* Margaret Brown.

Deviſe.

THE caſe was, that in 1663. *Quarles Brown* made his will in writing, and made *Michael Dunkin*, the plaintiff's father, and three others his executors, in truſt for *Margaret*, and died. 1667. adminiſtration, with the will annexed, was granted to the ſaid *Michael Dunkin* the father. In *October* 1673. *Michael Dunkin* the father makes his will, and the plaintiff his executor, and dies; the defendant takes out adminiſtration of *Quarles Brown*'s eſtate for the uſe of *Margaret*, and puts in a caveat againſt the now plaintiff's proving his father's will, and prays that the ſaid will may not be proved till a commiſſion of appraiſement hath iſſued out, to appraiſe the goods of *Michael Dunkin* deceaſed, and a commiſſion of inſpection to view the books, papers and writings of the ſaid deceaſed, and had them. The plaintiff appeals to the delegates, where *Mun* put in her allegations.

And the plaintiff moved by ſir *Francis Winnington* for a *Mandamus* to be directed to the judge of the prerogative court to command him to proceed in proving the will; and alledged *F. N. B.* 63. *de cautione admittenda*, and the caſe of the *Chriſms*, and *Gold*'s caſe, 1652. and the rather, for that the will is not controverted, but the probate ſtopped for a collateral cauſe; and the *Mandamus* was granted by
* P. 236. the three * judges, *abſente Hale*. *Nota*; The ſuggeſtion for the *Mandamus* was brought into court, and read before the

the *Mandamus* granted. *Vid. F. N. B.* 200. *a. Ex grave Querela* to inforce the mayor of *Oxford* to prove a will. *Et ibid. a.* A writ lies to the ordinary.

Benſon *verſus* Hodſon.

Paſch. 26 Car. 2. *Intr.* Hill. 25 & 26 Car. 2. Rot. 696.

A Tenant for life, the remainder to the uſe of *B.* in tail, remainder to *C.* in tail, remainder to the heirs of the defendant. Provided that *A.* ſhall have power to make leaſes for years in poſſeſſion, reverſion or contingency. *A.* makes a leaſe for years, to commence after the death of *B.* without iſſue. Remainder. 1 Lev. 28. 1 Mod. 108. 3 Keb. 274, 287, 292.

By *Hale* chief juſtice, *B.* may bar this leaſe by a common recovery, although this ariſe precedent to the eſtate-tail, becauſe it is in continuance of the eſtate of *B.*

Williams *verſus* Fry.

Mich. 22 Car. 2, Rot. 392. B. R,

EJECTMENT for *Newport* houſe of the demiſe of *George Porter*. Upon *Non culp.* a ſpecial verdict. The earl of *Newport* was ſeiſed in fee, and had iſſue three ſons yet living, and two daughters, *Anne* and *Iſabel*; *Iſabel* married the earl of *Banbury*, by whom ſhe had iſſue *Anne*, now defendant; the other ſiſter *Anne* was married to *Thomas Porter*, by whom ſhe had iſſue *George Porter*, the leſſor of the plaintiff. 8 *Feb.* 18 *Car.* 2. the earl of *Newport* made his will in writing, and deviſed the houſe to his wife for her life, remainder to the defendant *Anne* and the heirs of her body, under this condition (on which the caſe depends) *viz.* Condition. 2 Danv. Abr. 10. p. 9. 30. p. 2. 2 Lev. 21. 1 Mod. 68. 1 Vent. 199. 2 Keb. 756, 787, 814, 867. 3 Keb. 19.

Provided always and upon condition, that if my ſaid grandchild do marry without the conſent of my ſaid wife, Charles *earl of* Warwick, *and* Edward *earl of* Manchester, *and the major part of them; and in caſe the ſaid lady* Anne Knowles *do or ſhall marry without the conſent of the major part of my ſaid truſtees, or ſhall happen to depart this life without iſſue of her body, then I will and bequeath the ſaid premiſſes unto my grandchild* George Porter, *ſon of my ſaid deceaſed daughter lady* Anne, *late wife of* Thomas Porter, *and his heirs for ever.* * P. 23.

18 *Aug.* 1667. *Anne* marries *Chriſtopher Fry* without the conſent

conſent of the counteſs of *Newport*, earl of *Warwick*, and earl of *Manchester*, and the ſaid *Anne* had not then notice of the will of the ſaid earl of *Newport*, and then ſhe was but of the age of fourteen years.

Reſolved 1. It is a limitation, and not a condition; tho' the words are the expreſs words of a condition, yet they muſt always be conformable to the intention of the parties. *Dyer* 317. *pl.* 5. 3 *Co.* 21. 3 *Cr.* 833. 2. 591. 3. 376. 2 *Leon.* 31. *Owen* 8. *Roll. Abr.* 411. By which caſes it appears that words of condition in a will ſhall enure as a limitation; and though in *M. Portington*'s caſe 10 *Co.* it is ſaid otherwiſe, yet that is but an accumulative reaſon, which was not neceſſary.

Reſolv. 2. Notice of the condition was not neceſſary: 1. None is appointed by the deviſor to give notice. 2. No body is concerned to give notice, the heirs and executors have nothing to do therewith. 3. All parties had equal means of coming to notice; and if notice be requiſite it might be a means to avoid the will of the deviſor. 2 *Cr.* 119. 1. 575. 4 *Co.* 82. 5. 110. 1 *Co.* 391. 4. It is a thing which concerns his own intereſt, which is the true reaſon of ſir *Andrew Corbet*'s caſe. 5. It was not impoſſible for the defendant to have inquired and informed herſelf; and if ſhe remains ignorant and not informed, it is her own folly. 1 *Roll. Abr.* 463. *Hob.* 68.

As to *Francis*'s caſe, 8 *Co.* 92. there the party had other means to claim beſides the will, and ſhould not need to take notice of the will. But in our caſe the will is the only way to claim the eſtate, and therefore the defendant ought to take notice thereof. As to the caſe 2 *Cr.* 144. *Molineux*, It lies there properly in the conuſance of the younger ſon, that the legacies be paid or not, *&c.* and differs from this principal caſe. And ſo judgment was given by the whole court *(abſente Morton)* for the plaintiff. *Finch* attorney general, *Jones* king's counſel for the plaintiff. *North* ſolicitor, and *Winnington* for the defendant.

P. 238. * *Memorandum*, Quod decimo ſexto die *Octobris* anno Regni Regis *Caroli* Secundi 29. Annoque Domini 1677. recepi Breve Domini Regis, quod ſequitur in hæc verba: *Carolus* ſecundus, Dei gratia, *Angliæ*, *Scotiæ*, *Franciæ* & *Hiberniæ* Rex, Fidei defenſor, *&c.* Dilecto & fideli noſtro *Thomæ Raymond* Armigero ſalutem, Quia de adviſamento Conſilii noſtri ordinavimus vos ad ſtatum & gradum Servientis ad legem a die Sancti *Michaelis* prox. futur. in tres ſeptimanas ſuſcipiend. Vobis mandamus firmiter injungend quod

quod vos ad ſtatum & gradum prædict. in forma prædicta ſuſcipiend' ordinetis & præparetis, & hoc ſub pœna mille librarum nullatenus omittatis. Teſte meipſo apud *Weſtm.* tertio die *Julii* Anno Regni noſtri viceſimo mono.

Sur le Label ſic inſcribitur, Dilecto & fideli noſtro *Thomæ Raymond* Armigero ad ſtatum & gradum Servien' ad legem ſuſcipiend' Ret. tres Michaelis. *Barker.*

In this call were thirteen ſerjeants, *(viz.)* of *Gray's Inn*, *Thomas Holt*, *William Gregory*, *Richard Weſton*, ſir *Robert Baldock*, My ſelf and ſir *Thomas Stringer*. Of the *Inner Temple*, ſir *William Dolbin* recorder of *London*, *Richard Holloway*, *Thomas Street* and *John Simpſon*. Of the *Middle Temple*, *Thomas Rawlins*. Of *Lincoln's Inn*, *Thomas Strode* and ſir *John Shaw*. The inſcription of the rings, *Gratiâ Regis, non operibus Legis.*

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* Term. Paſch. 26 Car. 2. B. R. * P. 239.

Wigſon *verſus* Garret. *Ejectment.*

Power.
2 Lev. 149.
1 Vent. 278.
3 Keb. 366, 489, 510, 536, 572.

THE earl of *Leiceſter* 21 *Eliz.* makes a ſettlement upon himſelf for life, the remainder to his iſſues, the remainder to others, with power of revocation, by indenture ſubſcribed and ſealed by himſelf, and to limit new uſes. The *26th* of *Eliz.* he covenants to levy a fine to other uſes, and four years after levies a fine accordingly. And if this indenture and fine make a revocation of the uſes in the firſt deed was the queſtion. Reſolved that it is a revocation, becauſe that the deed and the fine are but one conveyance, and a caſe was cited in *Mich.* 26 *Car.* 1. *C. B. Rot.* 1442. *Ingram* verſus *Parker*. Sir *William Cateſby* makes a conveyance to the uſe of himſelf for life, the remainder to *Robert* his ſon in tail, with a proviſo for him, or his ſons, by deed under hand and ſeal to revoke. Sir *William* dies, *Robert*, the ſon, by bargain and ſale ſells for 1000*l.* But the deed was not inrolled, and after a fine was received, and held by three juſtices that the fine was an extinguiſhment of the power:

But

But *Hale* chief justice doubted of the case to be law. And he cited dame *Hastings*'s case, which was tenant for life with a remainder over, with a power to make a jointure. And the tenant for life covenants to stand seised to the use of his wife, for her life, for her jointure. Resolved a good execution of the power. In covenant by indenture that when *J. S.* pays 100*s.* he shall have his land, is a revocation. Judgment was given for the plaintiff.

* P. 240. * Risley *versus* Dame Baltinglass. *Ejectment in the Exchequer.*

Devise. 2 Danv. Ab. 528. p. 8.

THE case was, *Temple* and two others were tenants in common of the manor of *Burton Daffet* in the county of *Warwick* in fee. *Temple* makes his will in writing of his third part, and after by indenture and fine partition is made betwixt ~~the tenants in common~~; and if this partition be a revocation of this will was the question. And it seemed to all the barons, *viz. Montague*, *Littleton*, *Thurland* and *Bertie*, that it is not any revocation: But judgment was not given, because the plaintiff obtained leave to discontinue his action.

Term.

* Term. Mich. 28 Car. 2. * P. 241.

In the Exchequer.

The Attorney General *verſus* Sir Edward Farmer, *By Engliſh Bill.*

THE caſe was ſuch, The king ſeiſed in fee of the manor of *Holbeck* in the county of *Lincoln*, grants it with the appurtenances, and alſo *Omnia fundum, ſolum, arenas, terras mareſcales & omnes alias terras, quæ modo inundat' exiſtunt, & quæ fuerint imposterum recuperat de mari*, with a *Non obſtante* the miſrecital, &c. The lands in queſtion were under the ſalt water at the time of making the patent, and were ſince recovered from the ſea. And the ſole queſtion was, If theſe lands improved and recovered from the ſea paſs by the ſaid grant? Grant. 2 Lev. 171.

Holt for the king. They do not paſs; 1. Let us conſider what ſhall paſs if it were the grant of a common perſon.

2*dly*, How this differs being now in the caſe of the king.

3*dly*, The nature of the thing granted.

The words are, *All the lands contiguous and adjoining to the ſea*; what ſignification theſe words ſhall have; for if all the lands paſs, &c. it will extend to *Denmark*.

2. If this caſe be conſidered as the caſe of the king. Every grant of the king ought to comprehend certainty; and therefore his grant of demeſnes doth not comprehend copyholds, although it be otherwiſe in caſe of a common perſon.

3*dly*, This grant is of part of the ſea, which being parcel of the prerogative, ought to be expreſly named; and the ſea is the ſoil of the king, *Selden's Mare Clauſum* 223. which refers to a proclamation of the king 7 *Jac.* mentioned in *Lex Mercatoria* 135.

Object. Here is a particular grant, and certain words, for they are *Quandocunque in poſterum recuperat fuerint per derelictionem maris.*

Reſp.

Resp. It is only a possibility, and therefore void; as if the king grants land when it shall escheat, it is a void grant.

* P. 242. 2. If * it shall be a good grant, it shall be of a freehold to commence *in futuro*, which the law permits not.

Wallop for the defendant. It is inquirable, 1. if the thing here be grantable by the king. 2. If here be sufficient words to pass it.

As to the 1st, Here is a capacity in the king, because he is absolute lord of the British seas, as appears by *Selden's Mare Clausum*, he may grant part of his marine patrimony as well as his lands. 2. Here is a person capable to take; subjects are capable of a property in the sea. *Selden's Mare Clausum, lib.* 1. *cap.* 15. *pag.* 60. *De jure Belli.*

As to the 2d, Here are words sufficient to pass these lands. True it is, that franchises or other things of prerogative do not pass without plain words; therefore a grant of *Bona felonum, &c.* will not pass the goods of one that stands mute and will not plead. *Mich.* 8 *H.* 4. 2. *pl.* 2. So the grant of the amerciaments of his tenants doth not pass amerciaments of them by the king as commissioners of sewers. 2 *Bulstr.* 235. The king against the earl of *Exeter*. But here the grant is not of a thing which is part of the prerogative; for the soil of the sea is in the king as part of his inheritance, and not as a thing of prerogative. 2 *Lem.* 158. By *Walmsly*. It was adjourned.

Sir *Francis North*, Chief Juſtice.
Sir *Robert Atkins*,
Sir *Hugh Wyndham*,
Sir *William Scrogs*, } Juſtices.

Serjeant Barbe *and others, Executors of* John Pynſent, *late Prothonotary of this court*, Plaintiffs, *verſus* Joſhua Burton *Gent. Defendant.*

Aſſumpſit. Foxwiſt *verſus* Tremain, *ante* 198.

IN *Aſſumpſit*, the plaintiff declares that the defendant 28 *Aug.* 1668. was indebted to the ſaid *John Pynſent* in his life-time in 60*s. pro pecuniis ipſius* Johannis Pynſent *eidem* Johanni Pynſent *in vita ſua debit' pro damnis Clericis ut un' Prothonotarior' Curiæ Domini Regis de Banco hic & per ipſum* Joſhuam *ad uſum ipſius* Johannis Pynſent *ante tempus illud habit' & recept'*, the which he the ſame day and year promiſed to pay to the ſaid *John* in his life-time upon requeſt, the which he hath not done, to his damage of 20*l.* The defendant pleads *Non Aſſumpſit infra ſex annos.* The plaintiff demurs; and adjudged for the defendant, that this debt for damage clere is within the ſtatute of 21 *Jac.* becauſe it riſes out of the action, and not grounded on the record.

Term.

This Term Juſtice *Scrogs* was made Chief Juſtice of the *King's Bench*, in the place of Sir *Richard Rainsford*; *Vere Bertie*, Baron of the *Exchequer*, made Juſtice in his place; and *Francis Brampſton* Serjeant, Baron of the *Exchequer*.

Angel *verſus* Cleypool.

Debt.

DEBT for 300*l.* The plaintiff obtains judgment by *Nihil dicit* five years ago; the defendant brings error *in Banco Regis*, and aſſigns for error, no original, and upon a *Certiorari* the *Cuſtos Brevium* returns no original. And after the plaintiff procures an original, and upon enquiry in chancery the maſter of the rolls ordered that the writ ſhould be ſet aſide. And now ſerjeant *Barrel* moved that the writ ſhould be ſet aſide and taken off the file.

North chief juſtice, The order of the maſter of the rolls hath not any authority here, for if the *Cuſtos Brevium* take it off the file he forfeits his office.

Brooks *verſus* Hague. *Aſſumpſit.*

Caſe.
3 Salk. 19.
3 Jac. cap. 7.

THE plaintiff counts ſpecially as attorney, for ſeveral fees and ſums of money by him expended in ſeveral ſuits for the teſtator of the defendant, and that he demanded them, and neither the teſtator nor the defendant had paid them. The defendant pleads the ſtatute of 3 *Jac. cap.* 7. and

and that the plaintiff had not given to the teſtator, nor to the defendant himſelf before the writ brought, any bill of charges according to the ſtatute. Upon this the plaintiff demurs; and adjudged for the defendant, that it is a good plea.

Term. Hill. 30 & 31 Car. 2. C. B.

* P. 246.

Langley *verſus* Chute. *Prohibition.*

THE plaintiff ſuggeſts that there is a cuſtom time whereof, &c. within the pariſh of *Stretham* in the county of *Surrey*, that the churchwardens with the major part of the pariſhioners may order the ſeats in the church, and the churchwardens are to ſee to the repairs of them; and that the defendant libelled in the eccleſiaſtical court for the ſole uſage of a pew in the ſame church, and ſet forth in his libel, that one *Baduile* 1611. being ſeiſed of the land within the pariſh, built an houſe upon it, and after in the year 1637. at his own coſt built the ſaid pew in the church for himſelf and his family, and ſold the houſe and pew to the defendant *Chute* and his heirs, and by ſentence in the eccleſiaſtical court the ordinary annexed the ſaid pew to the ſaid houſe, and that the defendant and his heirs enjoyed it. And that the churchwardens would have placed the plaintiff there, and the defendant libelled againſt the plaintiff in the eccleſiaſtical court. Now the plaintiff prays a prohibition, and alledges 2 *Roll.* 24. *Brabin* verſus *Trediham*, *Poph.* 140. Prohibition.

North chief juſtice. A prohibition ſhall not be granted, becauſe the ordinary hath juriſdiction, and the churchwardens cannot juſtle out his authority, when the privilege is claimed only for the defendant and his family; becauſe as to him and his heirs a prohibition lies, and if the plaintiff be grieved by the ſentence, he may appeal. And the office of churchwarden is a kind of eccleſiaſtical office. True it is, the pariſhioners are to take care of the repairs of the church,

church, as it appears, *Regiſt.* 44. *b.* but the ordinary hath of common right the ordering of pews in the church. If this ſuggeſtion ſhould hold, the ordinary's juriſdiction would be totally ſet aſide.

Wyndham and *Bertie* juſtices accordingly; but *Atkins* juſtice *contra*, That a prohibition lies, becauſe this caſe doth not differ from the caſe of *Brabin*.

* P. 247. * Baynes *verſus* Edward Belſon.

Intr. Windford Trin. 30 Car. 2. Rot. 1496. *Oxon.*

Power.

EJECTMENT of the demiſe of ſir *Thomas Curſon* baronet: Upon Not guilty pleaded, the jury find a ſpecial verdict,

That ſir *John Curſon* being ſeiſed of the manor of *Waterbury*, of which the lands in queſtion are parcel, by indenture, *Dat.* 12 *Sept.* 1654. in conſideration of a marriage between his ſon *Thomas*, leſſor of the plaintiff, and *Elizabeth* the daughter of *William Burrows*, and 1000*l.* portion, and for the affection he bore to his relations, covenanted to ſtand ſeiſed of the ſaid premiſſes, To the uſe of himſelf for life, remainder to *Broom Whorewood*, *William Burrows* and *Elues* and their heirs, during the life of the ſaid *Tho. Curſon*, his ſon and heir apparent, remainder to the firſt, and every other ſon of *Thomas* ſucceſſively in tail male, remainder to *John Belſon* in tail male, remainder to *Auguſtine Belſon* in tail male, remainder to *Edward Belſon*, now defendant, in tail male, with remainders over, with power for ſir *John* to make leaſes to any perſons for one, two or three lives, or for one and twenty years, reſerving the ancient rent. That the marriage took effect between the ſaid *Thomas Curſon* and *Elizabeth Burrows*. That ſir *John* 11 *January* 1655. demiſed the premiſſes to the ſaid *Edward Belſon* for one and twenty years, to commence after the deaths of *Jacob* and *Meeks*, who were tenants for lives, and who lived ſeveral years after. That the ſaid *Whorewood*, *Burrows* and *Elues* were not at all of kin to ſir *John Curſon*. That ſir *John Curſon* died before the ſaid *Thomas Curſon* had any iſſue male born. That afterwards *Thomas* had iſſue *John Curſon*. That *John Belſon* and *Auguſtine Belſon* are dead without iſſue. That there was no other execution of the deed but ſealing and delivery.

Croke

Croke ſerjeant for the plaintiff. The queſtions upon this verdict are:

1. Whether the power to make leaſes being general, be good in this caſe?

2. Whether ſir *John* hath purſued the power in making a leaſe *in futuro?*

* 3. Whether the uſes limited (after the eſtates in tail male to the ſons of ſir *Thomas Curſon*) to *John Belſon*, *Auguſtine Belſon* and *Edward Belſon* do ariſe, partly upon ſealing the conveyance, or that the uſe continues in the covenantor till after the deaths of the ſons without iſſue male? * P. 248.

To the two firſt points. The whole court gave their opinions, *viz.* To the 1*ſt*, That the power to make leaſes being general, is void, it being upon a covenant to ſtand ſeiſed. *Mildmay*'s *caſe*, 1 *Co.* 2 *Roll. Abr.* 260.

To the 2*d*, The power is not well executed, the leaſe being to commence *in futuro*. 2 *Roll. Abr.* 261. *Yelverton* 222. *Stokham* verſus *Hawkins*, 6 *Co. Fitzwilliam*'s caſe, and *Lepar* and *Wroth*'s caſe, *Hob.* 151. *Colt*'s caſe.

As to the 3*d* point, *Croke* proceeds. The caſe is thus: *H. covenants to ſtand ſeiſed to the uſe of himſelf for life, remainder to the uſe of ſtrangers and their heirs, during the life of* Thomas Curſon, *remainder to the ſons of* Thomas Curſon *ſucceſſively in tail male, remainder to* Edward Belſon *in tail.* The covenantor dies before any ſon of *Thomas* is born, and afterwards a ſon is born, whether *Edward Belſon* next in remainder will have the lands preſently, or ſhall ſtay till all the iſſues be dead without iſſue male? And I conceive *Edward Belſon* ſhall take immediately after the death of the covenantor.

1. Nothing paſſes to theſe ſtrangers without inrolment, 7 *Co. Bedel*'s caſe, 11 *Co. Harpur*'s caſe, 2 *Roll. Abr.* 783. *H. pl.* 4. and conſequently nothing accrues to the ſons of *Thomas*. And when a grant is made to two, and the one is capable to take, and the other not, the eſtate ſhall veſt in the perſon capable only at the common law. *Perk.* 108. *b. pl.* 566. *Dyer* 300. *b. pl.* 39. and 309. *a. pl.* 67. *Moor* 494. *pl.* 687.

Object. This caſe differs, becauſe it is in caſe of an uſe by covenant to ſtand ſeiſed.

Reſp. There is no difference, 6 *Co. Fitzwilliam*'s caſe, uſes ſhall be expounded according to the rules of common law. And this way of limiting eſtates by covenant to ſtand ſeiſed begun in *Engleſield*'s caſe, and *Bainton*'s caſe, and *Sherington* and *Pledal*'s caſe, *Plowd.* 301. And the ſtatute incorporates the uſe to the poſſeſſion, in caſe of a covenant to

ſtand ſeiſed, as well as in other caſes. And here ſir *John Curſon* covenanting to ſtand ſeiſed to the uſe of himſelf for his life, is in of a new eſtate, and not of his old eſtate.

* P. 249. * *Object.* Signior *Pagit*'s caſe, 1 *Co.* 154. *a.* and *Moor* 193. *pl.* 343.

Reſp. There is a great difference between this and that caſe; for there the lord *Pagit* had no eſtate for his life, but here the covenantor hath, and therefore the uſe here ought to veſt immediately, *Hob.* 74. *Barnes*'s caſe. And here the intent of the covenantor was that all eſtates ſhould be out of him; and if the caſe ſhould be otherwiſe, where ſhould the eſtate be after the death of the covenantor? For *Thomas* cannot have the particular eſtate, and the inheritance alſo *ſimul & ſemel*, which he muſt have in this caſe, if the eſtate ſhall continue in the covenantor 'till the ſon of *Thomas* be born.

North chief juſtice. It ſeemed that this remainder veſts immediately after the death of ſir *John Curſon* in *Belſon*, as *Lewis Bowle*'s caſe is, 11 *Co.* 80. *a.* Adjourned.

Pont *verſus* Pont. *Partition.*

Mich. 30 Car. 2. Rot. 559. *Winford.*

Ancient Demeſne.

IN a writ of partition betwixt tenants in common by the ſtatute of 31 *H.* 8. *cap.* 1. the tenant pleads *Ancient Demeſne*; and adjudged a good plea, according to the caſe betwixt *Grace* and *Grace*, 1 *Roll. Abridg.* 322. *E. pl.* 10. But here upon the record there were found ſeveral diſcontinuances, and therefore judgment was given for the demandant.

Carſey *verſus* Wood.

Trin. 29 Car. 2. Rot. 1236. *Winford.*

Deviſe. 1 Cr. 525. Aſcough's *caſe.*

EJECTMENT. A ſpecial verdict. A man ſeiſed in fee of lands held *in Capite*, deviſed the whole to the corporation of the city of *Norwich* upon a charitable uſe, and whether the deviſe be good for the whole, or only for two parts, was the queſtion. And whether the ſtatute of 43 *Eliz. cap.* 4. doth make a good deviſe contrary to the ſtatutes of 32 & 34 *H.* 8. And reſolved, It is good but for two parts only. And by *Maynard* ſerjeant, Where 'tis ſaid, that if a copyholder deviſe without a ſurrender, or tenant in tail deviſe, that 'tis good againſt the iſſue, 'tis not intended

good

good by the common law, but to be made good by the decree of the chancery grounded upon the ſtatute of 43 *Eliz. cap.* 4.

* Lucas *verſus* How. * P. 250.

EJECTMENT. Special verdict. The caſe was thus, A man makes a leaſe for years upon condition that the leſſee ſhall not aſſign over his term to any but his kindred, without licence from the leſſor; the leſſor aſſigns over the reverſion, and the leſſee aſſigns over his term and breaks the condition. And whether the grantee of the reverſion ſhall take advantage of this condition is the queſtion. Condition. It is a collateral condition as appears by Pennant's caſe, 3 Co. 64. a. and Stiles 265. Collins *verſus* Silley.

And by *Atkins* juſtice, It is ſuch a condition as is within the ſtatute of 32 *H.* 8. *cap.* 34. But it ſeemed to others to be a collateral condition. And it was adjourned.

Stephens *verſus* Hayns and others.

Trin. 30 Car. 2. Rot. 361. *Wryley.*

REPLEVIN for taking of five oxen. The defendant makes cogniſance as bailiff to the lord of the leet, becauſe the plaintiff was amerced there for not ſcouring a ditch in an highway, and the plaintiff demurred, becauſe the ſtatute of 18 *Eliz. cap.* 9. gives the forfeitures for highways to the ſurveyors of the highways; but adjudged by all the juſtices for the defendant, becauſe the party may be puniſhed in the leet, and alſo by this ſtatute for divers cauſes. Chimin.

Johnſon *verſus* Coltſon.

Trin. 30 Car. 2. Rot. 1463. *Winford.*

TRESPASS and battery. Upon *Non Culp.* a ſpecial verdict. The plaintiff being complained of to a juſtice of peace, he makes a warrant to the defendant to take the plaintiff, and to find ſureties for the good behaviour; the defendant, being conſtable executes the warrant upon a *Sunday*, and whether good within the late ſtatute which ſays, *That all proceſs executed upon a Sunday other than for the peace ſhall be void.* Reſolved for the defendant, that a warrant for the good behaviour is a warrant for the peace and more; and this ſtatute is to be favourably extended for the peace. Proceſs.

* P. 251. This * judgment was affirmed in a writ of error in *B. R. Trin.* 32 *Car.* 2.

Memorandum, That on *Monday* the fifth day of *May* 1679. 31 *Car.* 2. I was ſworn one of the barons of the *exchequer*, though I had laboured (and not without great reaſon) to prevent it. I was ſworn at the ſame time with ſir *William Ellys*, who had been formerly one of the juſtices of the *common pleas*, and put out, and now brought in again. He was allowed precedency to ſir *Thomas Jones* and ſir *William Dolben*, juſtices of the *king's bench*, becauſe they were put in ſince his turning out; but this precedency was only by verbal ſignification from the king, and not expreſſed in his patent. With me was alſo ſworn ſir *Francis Pemberton*, to be judge in the *king's bench*; all of us were ſworn at my lord chancellor *Finch*'s houſe.

* P. 252. * Gerrit Johnſon *verſus* James Grant.

Replevin. Middleſex.

Avowry. THE plaintiff declares of the taking of divers goods 5 *November* 29 *Car.* 2. in a certain meſſuage of the plaintiff's ſituate in *Long-Acre*, in the pariſh of St. *Martin's in the Fields*, and detaining them againſt ſureties and pledges, *ad damnum* 200*l.*

The defendant avows the taking, for that *ante prædictum tempus quo*, &c. one *Sarah Grant*, widow, being executrix of the teſtament of one *Samuel Grant*, the father of the ſaid *James Grant*, gave to the ſaid *James* ſecurity for payment of 600*l.* being a legacy given the ſame *James* by his ſaid father, by his ſaid will, which ſecurity the ſaid *James ante prædictum tempus quo*, &c. ſurrendered to the ſaid *Sarah*, and diſcharged her from the ſame, upon agreement that ſhe ſhould pay him yearly during his life 80*l.* *per annum*, and ſhould give him ſufficient ſecurity for the ſame; That the ſaid *Sarah* was ſeiſed of ten meſſuages, of which the ſaid meſſuage *in quo*, &c. was one, in her demeſne as of fee; and ſo being ſeiſed after the agreement aforeſaid, in proſecution of the ſaid agreement, *ante prædictum tempus quo*, &c. by indenture dated the ſixth of *December* 1658. between the ſaid *Sarah* of the one part, and the ſaid *James* of the other part, did demiſe the ſaid ten meſſuages to the ſaid *James* (and ſets them forth by metes and bounds) *Habend.* from *Michaelmas* laſt for ninety-nine years, if *James* ſhould

ſo

ſo long live. *Reddend.* a pepper-corn; by virtue whereof *James* entered and was poſſeſſed.

That he being poſſeſſed, by his indenture dated the ſeventh of *December* 1658. demiſed the ſame to the ſaid *Sarah* for ninety-eight years, if *James* ſhould ſo long live; *Reddend.* the firſt year a pepper-corn, and the reſidue of the ſaid term 80*l. per annum* quarterly, or within twenty days, by virtue whereof ſhe entered and became poſſeſſed.

* And becauſe 240*l.* for three years ending at *Michaelmas* 29 *Car.* 2. and for twenty days after was behind and unpaid, he avows the taking in the meſſuage *in quo*, &c. as parcel of the tenements demiſed to the ſaid *Sarah*; *Et cum ſolutione reddit' prædict' onerat' & obligat'*, &c. * P. 253.

The plaintiff *Gerrit Johnſon*, confeſſes, that *ante prædictum tempus quo*, &c. the ſaid *Sarah Grant* being executrix of the ſaid *Samuel Grant*, father of the ſaid *James*, did give to the ſaid *James* ſecurity for payment of 600*l.* given as a legacy as aforeſaid. But *Proteſtando*, that *ante prædictum tempus quo*, &c. he did not ſurrender the ſaid ſecurity, and acquitted her therefrom upon the agreement alledged, nor that the ſaid indentures aforeſaid were in proſecution of the ſaid agreement. And for plea ſaith, That as to 20*s. per annum* for the rent of two meſſuages in *Long-Acre*, parcel of the ſaid rent of 80*l. per annum* for the three years, in the whole amounting to 3*l.* parcel of the ſaid 240*l. Rien Arrear.*

And as to the reſidue of the 240*l. viz.* 237*l. per annum* for the ſaid three years, he ſays, that before the ſaid demiſes made, *William* earl of *Craven* was ſeiſed of eight of the ſaid ten meſſuages ſituate in the *Strand*, in his demeſne as of fee, until the ſaid *Samuel Grant*, father of the ſaid *James Grant*, diſſeiſed the ſaid earl, and by reaſon thereof became ſeiſed thereof by diſſeiſin, &c.

And ſo being ſeiſed 30 *September* 1655. made his will in writing, and thereby deviſed the ſaid eight meſſuages to the ſaid *Sarah Grant* and her heirs, and died 3 *September* 1658. ſo ſeiſed.

That by virtue of the ſaid deviſe *Sarah* became ſeiſed in her demeſne as of fee of the ſaid eight meſſuages, and ſo being thereof ſeiſed, and of the ſaid meſſuage *in quo*, &c. and alſo of one other meſſuage in *Long-Acre*, ſeiſed the reſidue of the ſaid ten meſſuages by the ſaid indenture firſt mentioned, demiſed the ſaid premiſſes to the ſaid *James Grant* for ninety-nine years, *prout*, and he by the ſecond indenture redemiſed the ſame to the ſaid *Sarah* for ninety-eight years *prout*.

That

That afterwards, *& ante prædictum tempus quo, &c.* and before any of the three years rent was behind, *viz.* 27 *September* 26 *Car.* 2. the ſaid *William* earl of *Craven* * entered upon the ſaid eight meſſuages, claiming therein his former eſtate, and did expel the ſaid *Sarah* therefrom, and hath ever ſince been ſeiſed thereof.

* P. 254.

That all the ſaid ten meſſuages *October* 1659. and ever ſince were worth 80*l. per annum*, and no more.

That the ſaid eight meſſuages then, and ever ſince have been worth 79*l. per annum*, by reaſon whereof the ſaid 237*l.* being reſidue of the ſaid 240*l.* became inſolvible to the ſaid *James Grant*, and ſtill remains inſolvible. *Et hoc, &c.*

Upon this bar the avowant demurs, and the plaintiff hath joined in demurrer.

The ſole point remains to be ſpoke to is, as it is objected by the other ſide, That the plaintiff in this replevin in his bar to the avowry, hath pleaded as to parcel of the rent, *Rien arrear*, without making any title to himſelf.

And whether ſuch his plea be good, is the queſtion?

And I conceive 'tis a good plea.

1. I do agree, that at the common law a ſtranger could not, nor as yet can plead any thing to the lord's avowry for rent or ſervices, but *hors de ſon Fee*, or what doth *tantamount*.

He cannot plead tenure by leſs ſervices, *Rien arere*, or a releaſe, 2 *H.* 6. 1. *a.* 22 *H.* 6. 2 and 3. and 9 *Co.* 6. 10. *a.* is againſt that opinion.

This was grounded upon theſe reaſons and rules of law.

1. *Res inter alios acta alteri nocere non debet.* 'Tis not reaſon that he who is a ſtranger ſhall take upon himſelf to plead to the title of the tenure, with which he hath nothing to do, in prejudice of the very tenant; and there is a privity between the lord and tenant.

2. In pleading every man ought to plead that which is pertinent for him and his caſe; and therefore in an aſſiſe againſt a diſſeiſor and tenant, the tenant ſhall plead a plea which concerns the tenancy, and not the diſſeiſin.

* P. 255.

* The incumbent at the common law could not plead to the right of the patronage, wherein he hath nothing, 7 *Co.* 26 *Hall*'s caſe, 'till he was enabled by 25 *E.* 3. *cap.* 7.

2. But by the ſtatute of 21 *H.* 8. *cap.* 19. this ſtrictneſs is diſcharged, for as the avowant is not tied to avow upon any

any perſon in certain, but upon the land, as within his fee or ſeigniory; ſo the tenant of the land by the equity of that ſtatute is allowed to plead any plea to ſave and diſcharge his goods from the diſtreſs, *Legem feras quam ipſe tuleris.* So that the law of avowries, and their bars, is much altered from what it was by the common law.

Hob. 108. *Brown* verſus *Goldſmith.* In replevin, the defendant avows upon *A.* for ſervices of ſuit of court; the plaintiff pleads in bar, a leaſe for years from the avowant of the manor; and reſolved a good plea, though a ſtranger.

Br. Tit. Avowry 113. When the lord avows according to the ſtatute, the plaintiff in the replevin may have every plea, that the very tenant might have had though he be a ſtranger to the lord; and ſo is *Coke upon Lit.* 268. *b.* and many books there cited.

3. Though the plaintiff make no title, yet he may plead by this ſtatute, as well as if he did.

Trin. 15 *Jac. Moor* 883. *pl.* 1238. *Kingſwell* verſus *Crawley.* In replevin, The defendant avows for rent *eo quod* one *Dering* held certain lands of him by fealty, and certain rent; that the plaintiff hath the eſtate of *Dering.* The plaintiff replies, that *Dering* infeoffed one *Wright,* who made a leaſe for life to the plaintiff, *Abſque hoc,* that he had the eſtate of *Dering*; and ruled by the court, that the traverſe was void; for ſince the ſtatute the party is to avow upon the land, and then 'tis not material what eſtate the tenant had, if he occupies the land; and ſo the ſtatute hath changed the law in this point.

Hob. 108. Brown *verſus* Goldſmith.

Hill. 17 *Car.* 1. *C. B. March* 166. *Layton* verſus *Grange.* In a ſecond deliverance, the defendant makes cognizance as bailiff to *Thomas Marſh,* and ſets forth that *Thomas Marſh,* father of the ſaid *Thomas Marſh,* was ſeiſed of the manor of *Michael Hall,* of which the land in queſtion is parcel, and the ſaid lands are held by fealty and certain rent, and derives the tenancy to ſir *Anthony Cage,* and the ſeigniory to the ſaid *Thomas Marſh* the ſon; and as bailiff to him makes cognizance for fealty, *ut infra feodum & dominicum ſuum.* The plaintiff *proteſtando quod non tenet, pro placito dicit,* that the * defendant took the cattle as in the count, *Abſque hoc,* that *Marſh* the father was ſeiſed of the ſervices *infra tempus.* The defendant demurs. * P. 5.

By *Banks, Crawley* and *Foſter,* reſolved that the plea was good, though no title were made by the plaintiff or his maſter. *Reve* juſtice wavered in the point, but the others were poſitive in it; and *Banks* gave the reaſon, That as at the common law the tenant might plead any plea in bar to

an

an avowry for a rent-charge, as 8 *E.* 4. 23. *a.* is; ſo now ſince this ſtatute, the ter-tenant ſhall plead any plea to diſcharge the land from the diſtreſs. 2*dly*, That as this ſtatute hath been always conſtrued favourably for the benefit of the lord; ſo it ought to be for the benefit of the tenant. 3*dly*, That 'tis no reaſon that the tenant ſhall have his goods taken, and not uſe all ways to redeem them, when not party to the wrongs.

But 'tis objected, That our caſe is not within this ſtatute; the words whereof are, *Whereſoever any manors, lands, tenements or other hereditaments be holden by any manner of perſon or perſons by rents, cuſtoms or ſervices, if the lord of whom any ſuch manors, lands, tenements or hereditaments be ſo holden, diſtrain upon the ſame manors, lands or tenements for any ſuch rents, cuſtoms or ſervices, and replevin thereof be ſued, that the lord of whom the ſame lands, tenements or hereditaments be ſo holden may avow, or his bailiff or ſervant make conuſance, or juſtify for the taking the ſaid diſtreſſes upon the ſame lands, &c. ſo holden, as in lands or tenements within his fee or ſeigniory, alledging in the ſaid avowry, &c. the ſame manors, lands, &c. to be holden of him without naming any perſon certain to be tenent of the ſame.* And whether the leſſor be a lord within this ſtatute is the queſtion. And I conceive he is lord here within the words and meaning of this ſtatute.

For the Stranger can plead but as the Tenant may do, and if the Tenant for years be not within the ſtatute, this caſe will be out of it.

Lord is a relative word; and ſo a meſne is lord in reference to the tenant, and tenant in reſpect of the lord paramount.

He is lord within the ſtatute of *Marlb' cap.* 3. *Non ideo puniatur Dominus.*

Hill. 5 *H.* 7. 10. *pl.* 2. *Treſpaſs quare vi & armis clauſum ſuum fregit & averia ſua cepit & abduxit.* The defendant pleads his frank-tenement, and that he took the cattle damage-feaſant. The plaintiff replies, that he had a leaſe for years from the * defendant, yet continuing, and the defendant demurred; and the queſtion was, Whether this action did lie between the leſſor and leſſee, notwithſtanding the ſtatute of *Marlbr. cap.* 3.

* P. 257.

Reſp. It did not lie for ſo much as the leſſor did as lord, as to diſtrain for his rent, and to demean himſelf accordingly: but as this caſe was, he broke his cloſe, which he could not do as lord; and ſo not within the ſtatute.

The objection was, That he could not be lord, becauſe if the leſſee ſhould be diſtrained by the lord paramount, he could not have a writ of *Meſne.* But anſwered, that he ſhould have a writ of covenant in lieu thereof. *Mich.* 2 *H.* 6. 1. *b.* Thus are the books following. *viz. Mich.* 28 *E.* 3.

M. 2 H. 6. 1. b.

97.

97. *a. pl.* 15. *Mich.* 38 *E.* 3. 33. *b. Hill.* 48. *E.* 3. 5. *b. pl.* 10. *Co.* 2. *Inſt.* 106. 9 *Co.* 135. *b. Aſcough's* caſe. At the common law there are 4 ſorts of avowries. 1. By reaſon of a tenure, when the lord hath fee in the ſeigniory, and the tenant hath fee in the tenancy, *ut ſuper verum tenentem ſuum.* 2. Upon one as his very tenant by the manner, *ut ſuper verum tenentem ſuum in forma prædicta, viz.* When the tenant makes a leaſe for life, or a gift in tail, as upon his very tenant by the manner. 3. Upon one as his tenant by the manner, omitting this word *(very)* and that is, when the lord hath a particular eſtate in the ſeigniory, as an eſtate in tail, for life, or leſs intereſt, *Super tenentem ſuum in forma prædicta.* So ſhall the donor upon the donee, the leſſor upon the leſſee for life or years. 4. Upon the matter in the land, as within his fee and ſeigniory; as where the tenant by chivalry makes a leaſe for life, rendering rent, and dies, his heir within age, the guardian ſhall ſo avow upon the leſſee, *Super materiam prædictam in terris prædictis ut infra feodum ſuum.* And by the third way, the leſſor did always avow upon the leſſee at the common law. *Mich.* 47. *E.* 3. *fol. ult. pl.* 77.

Nota; If the rent of tenant for years be arrear, the leſſor cannot avow upon the termor upon the land, but upon the matter, *Hill.* 5 *H.* 7. 11. *pl.* 2. by *Fairfax*, and agreed by all the juſtices. Tenant for years ſhall do fealty, and the leſſor is *Dominus pro tempore* by reaſon of the reverſion; and an avowry ſhall be made upon him as upon the matter. And the different way of pleading manifeſts this; for at the common law, the way is, *Bene advocat captionem averiorum prædictorum in prædicto loco in quo, &c. ut in parcell' præd' meſſ.* * *eidem le Plaintiff in forma prædicta dimiſſ. ſuper tenementa virtute dimiſſionis prædict.* But the avowry upon the ſtatute is *in prædicto loco in quo ut parcell' meſſ. præd. cum reddit' præd' onerat' & obligat'*, 2 *Co.* 27. *b. Bettiſworth's* caſe, *Int.* 594, 595 and 597. And ſo is *Dyer* 257. *pl.* 11. where it is ſaid, *Ut in terris diſtrictioni ipſius l'avowant onerat' & obligat'*, is always intended for a rent-charge; but when he avows for a rent, which is due of common right, he ought to avow upon the tenant by the manner.

H. 38 H. 6. 23. b. pl. 7. T. 2 H. 4. 24. a. pl. 13. Raſt. Int. 569. * P. 258.

And ſo hath the avowant here done.

I will omit to ſpeak of the diſtreſs here, by virtue of the contract, admitting it to be out of the ſtatute, and is grounded upon the reſervation, as *Foſter's* caſe, 8 *Co.* 64. As a rent for owelty of partition. A rent confirmed by ſtatute, as *Bellingham's* caſe.

Reſolved.

Resolved. The plaintiff in a replevin may plead nothing in arrear, or any other plea, although he be a stranger and doth not make any title to the land.

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* P. 259.

* Term. Pasch. 31 Car. 2.

In the Exchequer.

Hunt *versus* Wotton.

Case.

TRESPASS *vi & armis*. The plaintiff declares, that the defendant the 14*th* of *April* 30 *Car.* 2. did thrust a woman, named *Margaret Hunt*, upon his son *Henry Hunt*, being an infant under the age of discretion, by means whereof his thigh-bone was broke, and the infant was so hurt that it was now despaired of his life, and the plaintiff, was inforced to expend great labour, and divers sums of money to cure him, *ad damnum, &c.* The defendant pleads *Non culp.* and found for the plaintiff, and damages 5*l.*

Sympson serjeant moved in arrest of judgment, because the plaintiff sustained no wrong, for that he was not compelled to expend any money, or to procure his son's cure.

But *Montague*, lord chief baron, *totis viribus contra.*

But to me it seems that the action doth not lie, for that the father cannot have the action, it not being laid *per quod servitium amisit*, nor that the son was less capable of procuring a fortune with a wife, *&c.* but the child himself ought to have brought the action, and he would have recovered the damages. Authorities in point, 3 *Cr.* 55. *Gray* versus *Jeffrys.* In an action upon the case, the plaintiff counts, that he put his son and heir apparent to the defendant to be his apprentice in the art of a tailor for seven years, and that the plaintiff was seised of lands of the yearly value of 20*l.* which were to descend to his said son. That the defendant *vi & armis* did assault the said son, and struck him with a spade upon his back, by which he became lame and decrepit, by reason whereof he lost his marriage, and could not marry him as before, *ad damnum* 200*l.* The defendant demurred; and

and adjudged for the defendant, becauſe treſpaſs for beating or battery of the ſon lieth not for the father, but the ſon only ſhall have the action, and a father ſhall not have an action for the loſs of the marriage of his ſon and heir, except when a ſtranger takes him by force and marries him; but if the ſon marries * himſelf, or a ſtranger procures him to marry one, the father hath no remedy, *Mich.* 1653. *Intr.* 1653. *Rot.* 935. *Norton* verſus *Jaſen*, *B. R. Stiles* 398. *Action on the caſe.* The plaintiff counts that the defendant broke his houſe and aſſaulted his daughter againſt his conſent, and begot a baſtard child on her, *per quod ſervitium amiſit.* The defendant pleads the ſtatute of 21 *Jac. Of Limitations of Actions.* And upon this a ſpecial verdict, that the aſſault was above four years before, and within ſix years. And reſolved, the father could not maintain an action for the aſſault of his daughter, but only by reaſon of the loſs of her ſervice. And then damages being given for both, it was not well, and therefore a *Venire Fac. de novo* was awarded; and by the common law the father is not bound to cure his child.

* P. 260.

It's a rule, that if a ſtatute gives remedy for any thing, it ſhall be preſumed that there was no remedy before at the common law, *Staſf. pl. Cor.* 2. and the ſtat. of 43 *El. cap.* 2. injoins the father to provide for his child, which he was not compellable to do by the common law. *Palmer* 559. *Beſtith* verſus *Coggil.*

But *Montague*, lord chief baron, and *Atkins* baron, clearly for the plaintiff, and relied upon *Church* and *Church*'s caſe in *B. R.* 1656. Where in *Aſſumpſit* the plaintiff declared that whereas the plaintiff had at his own charges buried the defendant's child, the defendant promiſed to pay him his charges; and though there was no requeſt laid, yet judgment was given for the plaintiff, and *Cr.* 63. 849. and 881. *Rippon* verſus *Norton*; but judgment was afterwards given for the plaintiff.

Robert Murrey, Gent. *verſus* Dorothy Eyton, Widow, *and* Roger Price.

Fliat.

Intr. Hill. 29 & 30 Car. 2.

IN treſpaſs and ejectment of the demiſe of *William George Richard* earl of *Derby* made 2 *May* 29 *Car.* 2. of one meſſuage, three watergriſt mills, ten acres of land, ten acres of meadow and fifteen acres of paſture in the pariſh of *Haſ.* alias *Queenhope*, for five years from the firſt day of the ſaid month of *May*. Upon Not guilty pleaded, the jury of the county of *Salop* being the next Engliſh county find a ſpecial verdict: *viz.*

Eſtate. 2 Jones 237. Pollexf. 491. Skin. 95. 2 Show. 104. Poſtea 286, 319, 338.

That long before the treſpaſs and ejectment king *Richard the third* was ſeiſed of the manor of *Hope* in his demeſne as of

of fee, in right of his crown, of which the tenements in the declaration are, and time out of mind were parcel. That the ſaid king *R.* 3. being ſo ſeiſed 17 *Sept.* 2 *R.* 3. by
* P. 261. his * letters patents under his great ſeal of *England* then dated, for the conſideration therein mentioned, did give and grant the manor and tenements aforeſaid with the appurtenances (amongſt other things) to ſir *Thomas Stanley*, knight, lord *Stanley*, and afterwards earl of *Derby*, ſir *George Stanley*, knt. lord *l'Eſtrange*, ſon and heir apparent of the ſaid *Thomas* lord *Stanley*; *Habendum* to them the ſaid *Thomas* lord *Stanley* and *George* lord *l'Eſtrange*, and the heirs male of the body of the ſaid *Thomas* lord *Stanley* for ever, of the ſaid late king by knights ſervice and rent of 50*l.* yearly, at *Eaſter* and *Michaelmas* by equal portions to be paid. The tenor of which ſaid letters patent follows in theſe words: *viz.*

Letters patent of *R.* 3. 17 *Sept.* 2 *R.* 3.

Richardus Dei gratia Rex Angliæ, Scotiæ & Franciæ & Dominus Hiberniæ, Omnibus ad quos Præſentes Litteræ pervenerint, ſalutem. Cum non ſolum Generis Nobilitas ſed & Juſtitiæ æquitas omnes provocent & maximè Reges & Principes homines de ſe bene meritos præmiis condign. afficere; Sciatis igitur quod ob ſingulare & fidele ſervitium quod dilecti noſtri Thomas Stanley Miles, Dominus Stanley & Georgius Stanley Miles, Dominus L'Eſtrange filius dicti Thomæ nobis præantea impender. non ſolum ſavend' Jur. & titulo noſtro cujus juris & tituli vigore jam nuper ad Coron. hujus Regni noſtri Angliæ Dno. adjuvante pervenimus, verum etiam reprimendo proditiones & malitias rebel' & proditor. noſtr', qui infra idem Regnum noſtrum perfidam jamdudum commotion. ſuſcitaverant, ac pro bono & fideli ſervitio nobis & hæredibus noſtris Regibus Angliæ per eoſdem Thomam & Georgium & hæred. ſuos pro defenſione noſtra & Regni noſtri prædict. contra quoſcunque prædict. inimicos & rebelles quoties futur. temporibus opus erint impendend. De gratia noſtra ſpeciali dedimus & conceſſimus ac per Præſentes damus & concedimus eiſdem Thomæ & Georgio in valor. annuo mille marcarum ultra repris' Caſtrum, Manerium & Dominium de Hope & Hopedale in March. Walliæ Com. Ceſtr. adjacen. cum ſuis membris & pertin. univerſis Manerium & Villam de Northwich cum paſtur. de Overmarſh cum ſuis pertin. in Com. Ceſtr. ac Maneria & Dominia de Weſt Lydeford Blakenden Halſbartre als. dict. Haleſbear cum ſuis pertin. in Com. Somerſet Manerium ſive Dominium de Bereford Sancti Martini cum ſuis pertin. in Com. Wilts Manerium & Dominium

nium de Ardington cum pertin. in Com. Berks Manerium & Dominium de Steventon cum membris & pertin' ſuis in Com. Bedd. ac Maneria & Dominia de Knotting Colleſden & Catton cum * ſuis pertin. in dicto Com. Bedd. & omnia * P. 262. terras & tenementa in Blomeham cum ſuis pertin. in eodem Com. Bedd. quæ nup. fuer. Rogeri Tocots Manerium & Dominium de Gaddeſden magn. cum pertin. in Com. Hertford Caſtrum Manerium Dominium & Socum de Kymbalton cum maneriis de Swinſhead Hardwick & Tilbrook & omnimod. Villis villat. & membris quibuſcunque in Com. Hunt' ad prædict. Dominium de Kymbalton pertin. ac etiam omnia meſſuagia terr. & tenementa reddit. & ſervitium in Macclesfeild & Chriſtilton cum pertin. in Com. Ceſtr. quæ fuer. Henr. nuper Ducis Bucks aut alicujus alterius ad ejus uſum in dicto Com. Ceſtr. ac manerium de Chorley & Bolton cum pertin. in Com. Lanc. ac terr' & tenementa in Brightmead in eodem Com. Necnon totum illud meſſuag. ac omnia terras & tenementa cum pertin. quæ fuer. Roberti Willingby Militis aut alicujus alterius ad ejus uſum in Paroch. Sci. Petri juxta Pauls Wharf in Civitate Londin. ſeu alibi infra eandem Civitatem unâ cum omnibus Terris Tenementis Meſſuag. Pratis Paſcuis Paſturis Silvis Boſcis Aquis Stagnis Vivar. Molendin. Gardin. Columbar. Reddit. Servit. Revercon. Cur. Let. Offic. Vic. Franchef. Pleg. Eſcaet. Libertat. Jur. Commoditat. quibuſcunque necnon feodo Milit. Advocat. & Patronat. Eccleſiar. Abbat. Priorat. Hoſpital. Rector. Capell. Cant. & al. Benefic. Eſcheator. quorumcunque Wardis Maritagiis Scutag. Releviis Hundred Wapentag. fin. amerciamen. forisfactur. Feriis Mercat. Chaſeis Parcis Warren. Piſcar. Wrec. maris Theſaur. invent. Waif Straif. Catall. Felon. & Fugitivor. Catal. Utlagat. attinct' convict' & felon. de ſe Retorn. Brevium & execution. eorundem necnon omnibus & ſingulis aliis Libertatibus Juriſdictionibus Franchef. quietanc. Commoditatibus Emolument. & liberis conſuetudinibus quibuſcunque ad prædict. Caſtra Dominia Maneria Terras Tenementa & cætera meſſuagia ac eorum quodlibet de antiquo pertinen. ſive ſpectan. aut infra eadem Caſtra Maneria Dominia Terras Tenementa & cætera Præmiſſa ſeu eorum aliquod emergen. contingen. provenien. ſeu antea habit' modo quocunque ac adeo plene & integre ſicut aliqua perſona vel aliquæ perſonæ in eiſdem vel eorum aliquo habuer. ſeu uſi fuer. quoviſmodo ante hæc tempora. Habend. & tenend. tenementa omnia & ſingula Habend. Caſtra Maneria Dominia Terras Tenementa & cætera Præmiſſa cum omnibus & ſingulis ſuis pertin. præfat. Thomæ Stanley & Georgio Stanley ac Hæredibus maſculis de

corpore

corpore ipſius Thomæ exeun. imperpetuum de nobis & Hæredibus noſtris per Servitium militare & reddit. quinquaginta librarum annuatim ad Feſta Paſchæ & Sancti Michaelis Archangeli per æquales portiones ſolvend. Conceſſimus
* P. 263. inſuper & per Præſentes concedimus eiſdem * Thomæ Stanley & Georgio ac hæredibus ſuis prædict. omnia exit. proficua & revercon. de ſupradictis Caſtris Maner. Dominiis Terris Tenementis & cæteris Præmiſſis cum pertinen. aut de aliqua inde parcell' a Feſto Sci' Michaelis Archangeli ult. præterit. proveniea. ſive creſcen. aut nobis quoviſmodo debit' percipiend. tam per manus Receptor. Ballivor. Firmar. ſeu al. Occupator. eorundem ſeu alicujus inde parcel. quam per manus nunc Eſcaet' & nuper Eſcaet. ſeparalit. in Com. & locis in quibus hujuſmodi Caſtra Maneria Dominia & cætera Præmiſſa ſeparaliter exiſtunt. Et volumus & concedimus quod iidem Eſcaet. & eorum quilibet Eſcaet. qui impoſterum erit de eiſdem exit' proficuis & proventionibus erga nos & hæred' noſtros quiet' & exoner. exiſtunt per Præſentes. Et ſi forſan aliquod eorum Caſtrorum Manerierum Dominior. Terrarum Tenementorum & cæterorum Præmiſſorum aut aliquam inde partem verſus ipſos Thomam & Georgium aut eorum alterum ſeu verſus Hæred' dicti Thomæ prædict. recuperari ſive extra poſſeſſion. ipſorum Thomæ & Georgii vel eorum alterius aut alicujus Hæred' dicti Thomæ prædict. aliquo debito modo evinci ſeu ipſos aut eorum aliquem inde legitime expelli contigerit tunc nos & hæred' nii. de al' Caſtris Maneriis Dominiis Terris Tenementis & Poſſeſſionibus infra Regnum nrum. Angliæ ad valor. annuum eorundem Caſtrorum Maneriorum Dominior. Terrar. Tenementor. ac cæterorum Præmiſſorum recuperat' vel evict' eiſdem Thomæ & Georgio & Hæred' ipſius Thomæ prædict' habend recompenſar. faciemus. Et inſuper de gratia nra. ſpeciali prædict. damus & concedimus per Præſentes omnia & ſingula Præmiſſa præfat' Thomæ & Georgio abſque fine ſeu feodo magno vel parvo nobis ſive ad opus nrum. pro eiſdem Præmiſſis vel aliquo Præmiſſor. reddend. ſolvend. ſeu faciend. quoviſmodo. Eo quod expreſſa mentio de vero valore vel certitudine Præmiſſorum ſeu eorum alicujus ſeu de aliis donis vel conceſſionibus eiſdem Thomæ & Georgio vel eorum alteri ante hæc tempora fact' in Patentibus minime fact' exiſt' aut aliquo Statuto Act' Ordinacon. vel Reſtriction. in contrar. fact' edict' ſive ordinat' aut aliqua re cauſa vel materia quacunque non obſtant'. In cujus rei Teſtimonium, &c.

By virtue whereof the ſaid *Thomas* and *George* did enter into the ſaid tenements, and were thereof ſeiſed to them and the heirs male of the body of the ſaid *Thomas* earl of *Derby*, and they being ſo thereof ſeiſed, the ſaid *George* lord *l'Eſtrange* had iſſue of his body one *Thomas* his eldeſt ſon, afterwards earl of *Derby*: and that afterwards the ſaid * *George* lord *l'Eſtrange* died in the life-time of the ſaid earl his father: and that the ſaid earl, his father, afterwards, *viz.* 1 *Jun.* 19 *H.* 7. died ſeiſed of the ſaid tenements in his demeſne as of fee-tail, *viz.* to him and the heirs male of his body; by reaſon whereof the ſaid tenements in the declaration did deſcend to the ſaid nephew, the ſaid *Thomas* earl of *Derby*, who entered into the ſaid tenements and became ſeiſed thereof in his demeſne as of fee-tail according to the limitation in the ſaid letters patent mentioned. And the ſaid *Thomas* earl of *Derby*, being ſo thereof ſeiſed, had iſſue of his body one *Edward* his eldeſt ſon, afterwards earl of *Derby*. That the ſaid *Thomas* earl of *Derby* laſt mentioned, afterwards, *viz.* 1 *Aug.* 13 *H.* 8. died ſeiſed of the ſaid tenements. By reaſon whereof the ſaid tenements deſcended to the ſaid *Edward* then earl of *Derby*. That the ſaid *Edward* entered and became ſeiſed thereof in tail to him and the heirs male of his body. That the ſaid *Edward* had iſſue *Henry* afterwards earl of *Derby*. That *Edward* died 24 *Octob.* 14 *Eliz.* ſeiſed as aforeſaid, and that the premiſſes deſcended to *Henry*. That the ſaid *Henry* had iſſue *Ferdinand*, afterwards earl of *Derby*, and *William Stanley*, his ſecond ſon, afterwards likewiſe earl of *Derby*. *Henry* 25 *Septemb.* 35 *Eliz.* died ſeiſed, and the premiſſes deſcended to *Ferdinand*, who entered and had no iſſue male, but only three daughters, *viz.* *Anne*, *Frances* and *Elizabeth*. That *Ferdinand* 16 *Apr.* 37 *Eliz.* died in the life of his brother *William* ſeiſed, and ſo the premiſſes deſcended to the ſaid *William*, who entered. That after the death of *Ferdinand*, for determination of ſuits and controverſies between the ſaid earl *William* and *Henry* earl of *Huntington* and *Elizabeth* his wife, one of the daughters of the ſaid *Ferdinand*, *Gray Bridges* lord *Chandos*, and the lady *Anne* his wife, another of the daughters of the ſaid earl *Ferdinand*, and ſir *John Egerton*, knight, then ſon and heir apparent of *Thomas* lord *Elleſmere*, lord chancellor of *England*, and the lady *Frances* his wife, another of the daughters of the ſaid earl *Ferdinand*, 18 *Novemb.* 4 *Jac.* an act of parliament was made of and concerning the ſaid ſuits and controverſies, and eſtate and title of the honours, caſtles, manors, lands and tenements of the aforeſaid earl *Ferdinand*; by which it was enacted as followeth, *viz.*

* P. 264.

Co. 4 Inſt. 283. 2 Anderſ. 115. pl. 60.

In

The act of 4 *Jac.*

In moſt humble manner beſeeching your royal majeſty your highneſs loyal, faithful and obedient ſubjects, *William* earl of * *Derby*, of the moſt noble order of the garter knight, *Henry* earl of *Huntington* and the counteſs *Elizabeth* his wife, *Gray Bridges*, lord *Chandos* and the lady *Anne* his wife, eldeſt daughter of *Ferdinando* late earl of *Derby*, ſir *John Egerton* knight, ſon and heir male apparent of the right honourable *Thomas* lord *Elleſmere*, lord chancellor of *England*, and the lady *Frances* his wife; which ſaid *William* earl of *Derby* is brother and heir male, and the ſaid ladies *Anne*, *Frances* and *Elizabeth* are daughters and co-heirs of the ſaid *Ferdinando*, late earl of *Derby*, who died without iſſue male of his body: That whereas after the death of the earl *Ferdinando* divers variances, ſuits and controverſies did ariſe and grow between your ſaid ſubjects *William* earl of *Derby*, and the ſaid ladies, as well touching the eſtate, right and title of, in and to the honours, caſtles, manors, lands, tenements and hereditaments of the ſaid earl, as alſo touching the filial portions and advancements of and for your ſaid ſubjects, the ſaid ladies *Anne*, *Frances* and *Elizabeth*; for appeaſing, ending and determining of which ſaid variances, ſuits and controverſies, the ſaid *William* earl of *Derby* and other iſſues male of the ſaid honourable houſe of *Derby*, as alſo the ſaid ladies before any their intermarriages, by and with the advice and conſent of the right honourable *Alice*, counteſs dowager of *Derby*, late wife of the ſaid *Ferdinando*, and mother of the ſaid ladies; and by and with the advice of other their honourable friends, and of their counſel learned, and officers, did ſubmit themſelves to the arbitrement, order and judgment of the right honourable *Thomas* lord *Buckhurſt*, lord high treaſurer of *England*, and now earl of *Dorſet*, and of the right honourable *Gilbert* earl of *Shrewſbury*, the right honourable *George* earl of *Cumberland*, deceaſed, *George* lord *Hunſden*, deceaſed, and of the right honourable ſir *Robert Cecil* knight, principal ſecretary to your highneſs, and now earl of *Saliſbury*, being the honourable and well affected friends, as well of the ſaid *William* earl of *Derby*, and other the iſſues male deſcended of that honourable houſe, as of the ſaid ladies heirs general; which ſaid honourable perſons are elected to end the ſaid controverſies, having deliberately heard the ſaid parties, and their learned counſel and officers, and ſuch other their loving friends as were authorized to deal therein, and having adviſedly heared and conſidered of their ſeveral rights, titles and claims, did by the conſent and agreement of all the ſaid parties and their counſel, officers and friends, for

* P. 265.

for the appeaſing, ending and extinguiſhment of all variances, claims, titles and * controverſies then moved and grown, and which then after might ariſe and grow between the ſaid parties or any of them touching the premiſſes, agree, order and determine (amongſt other things) That ſuch and ſo many of the ſaid caſtles, manors, lands, tenements and hereditaments, late parcel of the poſſeſſions and hereditaments of the ſaid *Ferdinando*, late earl of *Derby*, in the towns, hamlets, villages and places hereafter mentioned, and in every or any of them, ſhould be aſſigned, conveyed and enjoyed unto and by ſuch perſon and perſons, and of, for and during ſuch eſtate and eſtates, and with and under ſuch limitations, powers, liberties, declarations and ſavings, and in ſuch manner and form as hereafter is mentioned, limited and expreſſed. With which ſaid order and agreement ſo made by the honourable perſons, as well the ſaid *William*, earl of *Derby*, and the counteſs *Elizabeth* his wife, and the reſt of the iſſues male deſcended from that honourable houſe of *Derby*, as alſo the ſaid honourable lady *Alice* counteſs dowager of *Derby*, and the ſaid ladies *Elizabeth*, *Anne* and *Frances*, daughters to the ſaid late earl *Ferdinando* before, and until their ſeveral marriages, their ſaid huſbands and they did and yet do hold themſelves well contented and ſatisfied. * P. 266.

May it therefore pleaſe your moſt excellent Majeſty, that it may be enacted, and be it enacted by your majeſty the lords ſpiritual and temporal, and the commons in this preſent parliament aſſembled, and by the authority of the ſame, That all and every the caſtles, manors, lands, tenements, poſſeſſions, rents, reverſions, ſervices and hereditaments with all and ſingular their appurtenances, late the poſſeſſion and inheritance of the ſaid *Ferdinando*, late earl of *Derby*, in the towns, hamlets, villages and places hereafter mentioned, and in every or any of them, ſhall be from henceforth for ever aſſured and enjoyed unto and by the perſon and perſons hereafter named, of and for ſuch eſtates and limitations, and with and under ſuch powers, liberties, proviſoes, exceptions, declarations and ſavings, and in ſuch manner and form, as hereafter in this preſent act is mentioned, limited and declared; and that the actual and real poſſeſſion of all and ſingular the ſaid caſtles, manors, lands, tenements, poſſeſſions, rents, reverſions, ſervices and hereditaments ſhall be by authority of this preſent act immediately from henceforth veſted, adjudged, deemed and taken to be in the ſaid perſon and perſons hereafter named in poſſeſſion, remainder and reverſion reſpectively, of, for and

during ſuch eſtate and eſtates, and with and under ſuch powers, liberties, proviſoes, exceptions, declarations and
* P. 267. ſavings, and * in ſuch manner and form, as hereafter in this preſent act is likewiſe mentioned, declared, limited and expreſſed.

And afterwards in the ſame act of and concerning the manor of *Hope* it was enacted in theſe words: *viz.*

That the ſaid *Alice*, counteſs dowager of *Derby*, during her life, and after her deceaſe, the ſaid *William* earl of *Derby*, during his life, and after his deceaſe *James*, ſon and heir apparent of the ſaid *William* earl of *Derby*, and the heirs males of his body, and in default of ſuch iſſue the ſecond, third, fourth, fifth, ſixth and ſeventh ſons of the ſaid *William* earl of *Derby*, lawfully begotten, and the heirs male of their and every of their ſeveral bodies lawfully begotten, ſucceſſively and reſpectively according to the priority of their birth and age one after another; and in default of ſuch iſſue, ſir *Edward Stanley* knight, during his natural life, and after his deceaſe the firſt, ſecond, third, fourth, fifth, ſixth and ſeventh ſons of the ſaid ſir *Edward Stanley* lawfully begotten, and the heirs male of their and every of their ſeveral bodies lawfully begotten ſucceſſively and reſpectively according to the priority of their birth and age one after another; and in default of ſuch iſſue, *Edward Stanley* of *Bickerſtaff* eſquire, during his life, and after his deceaſe the firſt, ſecond, third, fourth, fifth, ſixth and ſeventh ſons of the ſaid *Edward Stanley* lawfully begotten, and the heirs male of their and of every of their ſeveral bodies lawfully begotten, ſucceſſively and reſpectively according to the priority of their birth and age one after another: And in default of ſuch iſſue *James Stanley*, brother of the laſt mentioned *Edward*, during his life, and after his deceaſe the firſt, ſecond, third, fourth, fifth, ſixth and ſeventh ſons of the ſaid *James Stanley* lawfully begotten, and the heirs male of their and every of their ſeveral bodies lawfully begotten, ſucceſſively and reſpectively according to the priority of their birth one after another, ſhall and may have, hold and peaceably and quietly enjoy all and every the manors, meſſuages, lands, tenements, rents, reverſions, ſervices, hereditaments, liberties, franchiſes and juriſdictions whatſoever, at any time heretofore the inheritance of the ſaid *Ferdinando*, late earl of *Derby*, in *Hope* and *Hopedale*, and elſewhere within the pariſh of *Hope* in the ſaid county of *Flint*, to the manor of *Hope* belonging or appertaining. And it was farther enacted, That the ſaid *William* earl of *Derby*, ſir *Edward Stanley*, *Edward Stanley* and *James Stanley* ſucceſſively

ſucceſſively and reſpectively in poſſeſſion to make leaſes of any of the premiſſes uſually letten, (except the caſtle of *Haward* and *Greenhalgh*, the manſion-houſe, parks, demeſnes of *Latham*, *Knowſley*, *Newpark*, *Buſcough*, *Childwal*, *Pilkington*, * *Hawarden*, *Greenhalgh*, *Broughton* in *Farnes*, *Bothome Armſhead*, *Witherſback*, *Ebenſham* alias *Enſham* and *Bidſton*, *the* manſion-houſe, *Channon Row* in *Weſtminſter*, the college-houſe in *Mancheſter* and the tower in *Liverpool* within the ſeveral counties of *Lancaſter*, *Cheſter*, *Flint*, *Weſtmorland*, *Oxon* and *Middleſex* for one and twenty years or under, or for one, two or three lives, or for any number of years determinable upon one, two or three lives in poſſeſſion, and not in reverſion, reſerving the old and accuſtomed rent; and power for them to make jointures not exceeding a third part. * P. 268.

That in the ſaid act there is a proviſo in theſe words:

Provided always, and be it enacted and declared by the authority aforeſaid, That your moſt excellent majeſty, your heirs and ſucceſſors, and all and every other perſon and perſons, bodies politick and corporate, their heirs and ſucceſſors, executors, adminiſtrators and aſſigns, and every of them, other than the perſons to whom any eſtate or eſtates are before limited, or mentioned to be limited, by this preſent act, and their heirs ſhall have, hold, and enjoy all and every ſuch and the ſame eſtate and eſtates, leaſe and leaſes, rights, titles, intereſts, reverſions, rents, annuities, penſions, ſervices, tenures, primer ſeiſins, liveries, actions, ſtatutes, bonds, recognizances, debts, extents, executions, judgments, entries, conditions, covenants, warranties, uſes, poſſeſſions, offices, commons, liberties, eaſements, profits, commodities, emoluments, claims and demands, as your highneſs, your heirs and ſucceſſors, or any of them, or other perſon or perſons, bodies politick and corporate, their heirs, ſucceſſors, executors, adminiſtrators or aſſigns, other than the perſons before excepted, to whom any eſtate or eſtates is before limited by this act, now lawfully have or hereafter ſhall or may lawfully have, or claim of, into, out of, or for any the ſaid caſtles, manors, lands, tenements, rents, reverſions, ſervices and hereditaments, or of, into, out of, or for any of them in ſuch and the ſame manner and form to all intents, conſtructions and purpoſes, as if this preſent act had never been had nor made. And your ſaid ſuppliants, *William* earl of *Derby*, *Henry* earl of *Huntington*, and the lady *Elizabeth* his wife, *Gray* lord *Chandos*, and the lady *Anne* his wife, and ſir *John Egerton*, and the lady *Frances* his wife, ſhall and will according to their moſt

bounden duties daily pray for your highneſs long, happy and proſperous reign over us.

That *Alice*, counteſs of *Derby*, in the act mentioned, was widow and relict of the ſaid *Ferdinand*, earl of *Derby*, and that the ſaid ſir *Edward Stanley* knight, at the making
* P. 269. of * the ſaid act was a perſon, who the tenements aforeſaid, next after the death of *James* the ſon of the ſaid earl of *Derby*, without iſſue male of his body, by the ſaid letters patent ought to take and have according to the limitation in the ſame letters patent contained.

That the ſaid *Edward Stanley* of *Bickerſtaff* in the ſaid act likewiſe mentioned, until the making of the ſaid act, was the perſon who ought to take and enjoy the ſaid tenements next after the death of the ſaid ſir *Edward Stanley*, without iſſue male of his body, according to the limitation of the ſaid letters patent; and that the ſaid *James Stanley*, brother of the ſaid *Edward Stanley* of *Bickerſtaff*, was the next perſon who ought to take and have the ſaid tenements next after the death of his ſaid brother *Edward*, without iſſue male of his body, by the limitation of the ſaid letters patent.

That 1 *May* 1636. the ſaid *Alice* counteſs dowager of *Derby* died, that earl *William* entered, and was ſeiſed *prout lex poſtulat.*

29 *Sept.* 1642. earl *William* died ſeiſed, and *James* his ſon entered and became ſeiſed *prout lex poſtulat.*

The ſaid earl *James* had iſſue *Charles*, afterwards earl of *Derby*.

15 *Oct.* 1651. earl *James* died ſeiſed, and earl *Charles* entered.

14 *February* 1653. the ſaid earl *Charles*, and *Dorothea Helena* his wife, by indenture between them of the firſt part, ſir *Charles Woolſeley* knight, *Richard Knightley* eſquire, *John Twiſleton* eſquire, *John Hewley* eſquire, *Rowland Jenkes jun.* eſquire, and *Joſhua Sprig* of the ſecond part, and *Thomas Crachley* eſquire, *Nicholas Brereton* gent. and *Roger Griffith* gent. of the third part, for 1700*l.* to the ſaid earl, and 1898*l.* 10*s.* to the truſtees for ſelling the ſaid eſtate by the parliament, paid by the ſaid earl's appointment, grant, alien, bargain, ſell, enfeoff and confirm to the ſaid *Charles Woolſeley*, *Richard Knightley*, *John Twiſleton*, *John Hewley*, *Rowland Jenkes* and *Joſhua Sprig* their heirs and aſſigns, the ſaid manor of *Hope*, *alias Queen Hope*; and the ſaid earl *Charles* for him and his heirs, doth warrant the premiſſes to the ſaid leſſees and their heirs, againſt him and his heirs, and that they ſhall enjoy the ſame accordingly.

And

And the ſaid *Charles* earl of *Derby* doth conſtitute the ſaid *Thomas Crachley*, *Nicholas Brereton*, and *Roger Griffith* his attornies jointly and ſeverally to make livery and ſeiſin of the ſaid premiſſes.

That livery and ſeiſin was executed accordingly, and the tenants of the ſaid manor did attorn thereto.

* 10 *April* 1654. That *Charles* earl of *Derby* and his wife levied a fine of the ſaid premiſſes at the great ſeſſions for the county of *Flint*, with warranty againſt all men with proclamations. * P. 270.

The ſaid fine was to the uſe of the ſaid indenture mentioned.

That the grantees entered and continued in poſſeſſion from the time of the making the ſaid indenture.

That the defendants at the time when, *&c.* and ſtill are tenants of the premiſſes to the ſaid grantees.

21 *December* 1672. earl *Charles* died, leaving iſſue the leſſor of the plaintiff now earl of *Derby*, and was at the death of his father at the age of ſixteen years, nine months and four days, and no more.

2 *February* 29 *Car.* 2. the leſſor of the plaintiff entered, and made the leaſe to the plaintiff *prout* in the declaration.

They find the ſtature of 34 *H.* 8. and conclude generally, If for the plaintiff, for the plaintiff, *&c.*

Levinz for the plaintiff. It is to be taken notice of, that this act of 4 *Jac.* in the record doth alter the eſtate limited by the letters patent; for by the act it is only limited to the ſeventh ſon; but by the letters patent to every other ſon, and then the remainder over to others.

1. 'Tis not doubted but that the reverſion ſtill remains in the crown.

2. The poſſeſſion of the feoffees is nothing to the purpoſe, for though there be fines levied and deſcents, yet the ſtatute of limitations hath no operation but from the death of earl *Charles*, which is but about three or four years ſince. Upon this record are two queſtions.

1. What effect the fine in 1654. and the feoffment with warranty have, taking the ſame abſtractively from the conſideration of the ſtatute of 34 *H.* 8. *cap.* 20.

2. What operation the ſtatute of 34 *H.* 8. hath in this caſe?

1. As to the feoffment, it is no diſcontinuance, becauſe the reverſion remains in the king. *Lit. ſect.* 625. and *Cc. Lit.* 335. *a.*

2. As to the warranty in the feoffment and fine, it is of no

no effect, becauſe it is a lineal warranty, and ſo cannot bar without aſſets.

As to the fine; it is no bar by the ſtatute of 32 *H.* 8. *cap.* 36. becauſe the laſt proviſo therein excludes all fines levied of lands intailed, where the reverſion is in the king, or intailed by act of parliament.

* P. 271. * But it is objected, that the words at the end of the proviſo are, *That every ſuch fine ſhall be of like force as they were or ſhould have been, if the act had not been made*; and ſuch eſtates-tail were barrable by fine by the ſtatute of 4 *H.* 7.

Reſp. The ſtatute takes notice that there were diverſities of opinion in that point.

Paſch. 19 *H.* 8. 6. *pl.* 5. *Dyer* 2. *b. pl.* 1. and this ſtatute of 32 *H.* 8. cures a doubt in caſe of ordinary perſons, but leaves out the fines of lands, whoſe reverſion is in the crown. And the exception would not have been inſerted, had they not barred before.

If we conſider how this point ſtood before this ſtatute, we ſhall find, *Br. Fines de terr.* 121. That ſuch fines did not bind the iſſue, becauſe no diſcontinuance. *Br. Aſſurances* 6. accordingly; but *Dyer* 32. *a. pl.* 1, *Engleſield* juſtice ſaid he knew it by experience, that a fine did bar the iſſue in tail, though the reverſion were in the crown. But *Shelley* juſtice doubted; and ſo there was judge againſt judge. 8 *Co.* 74. *a.* Such fine did not bar the iſſue; and ſo is 6 *Co.* 55. in *Chandos*'s caſe *obiter*; and *Co. Lit.* 372. *b.* A fine is a bar by 32 *H.* 8. but not by 34 *H.* 8. and ſo there are but opinions in this point, and no judgment. This doubt reached the parliament, and therefore they thought that the fine was no bar before 34 *H.* 8. And the concluſion is, That if it was no bar by 4 *H.* 7. it was now by 32 *H.* 8. and then came the ſtatute of 34 *H.* 8. which made an end of the queſtion; for by the opinion of all it is now no bar.

Then we muſt conſider, whether this act of 4 *Jac.* alters the uſe, and here it will be objected,

1. Here is no gift of the king, but of the parliament; for 1. *Alice* is let in before count *William*. 2. Count *William* hath now but an eſtate for his life, and afterwards to ſeven of his ſons ſucceſſively; but all the other of his ſons are excluded, and ſir *Edward Stanley* is let in in their place.

Reſp. This is a gift of the king within the intent and meaning of the ſtatute of 34 *H.* 8. for theſe reaſons.

1. There is no more eſtate given by this act of 4 *Jac.* than by the letters patent of 2 *R.* 3. but all the eſtates granted

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are within the compaſs of the heirs males of the body of *Thomas* firſt earl of *Derby*.

2. The parliament did not intend to give any thing, but to make firm an agreement between the parties.

* 3. The limitations to earl *William* for life, with the remainder to *James* in tail male is not any bounty, or augmentation of the eſtate which was given by the letters patent. The act hath taken away from earl *William*, but not added any thing. * P. 272.

4. If earl *William* had had twenty ſons, this act doth not exclude them, but others are let in; for the ſaving extends to them after the determination of the new particular eſtates, and the old eſtate-tail ſupplies the other ſons; and the act did not intend to make ſeveral donors, *viz.* The king as to ſome part, and the act as to other part.

5. The proviſo is, ſaving to the king, his heirs and ſucceſſors, ſuch, and the ſame eſtate, *&c.* as they now have; and how ſhall the tenure be ſaved, if the act muſt be the donor?

6. This is a caſe concerning the expoſition of an act of parliament, which ought to be as favourably conſtrued as a will.

Now let us examine the objections.

Object. 1. The eſtate of counteſs *Alice* is a new eſtate.

Reſp. 1. 'Tis poſſible ſhe hath but what ſhe had in right of dower.

2. This agreement ſhall be conſtrued to be purſuant to her dower.

3. But be it what it may be, ſhe is dead, and ſo is no prejudice.

Object. 2. The eſtate of count *William* is altered; for now he hath only an eſtate for life, the remainder to his iſſues in tail male.

Reſp. That is no gift, but a deprivation of a gift. And if a man have three horſes in his ſtable, and a man takes away two of them, he cannot be ſaid to give the third, which he took not away.

Object. 3. Here is a gift to count *James*, for he had nothing before during the life of count *William* his father.

Reſp. 1. This act hath not one word of giving in it, but that they ſhall hold and enjoy.

2. Here the meaning was not to make a gift, but in purſuance of an agreement between the parties to ſettle the eſtate; and ſo it is a diſtribution of the lands amongſt the family.

family. And this act confirms the agreement, as many acts do confirm an agreement of incloſures.

There is no ſubſtantial alteration; for tenant in tail by a gift from the crown is reſtrained from alienation to prejudice his iſſue.

* P. 273. * *Object.* But tenant in tail, where the reverſion is in the crown, may prejudice his iſſue; as *Co. Litt.* 373. *a. Stratford* verſus *Dover*; as if he be diſſeiſed, and the diſſeiſor levy a fine, and five years paſs.

Reſp. 3 *Cro.* 595. reports this caſe, and it is judge againſt judge; and 612. the judgment was given upon point of pleading, and not upon this point. *Moor* 467. *pl.* 665. reporting this caſe ſays, that the iſſue ſhall be bound.

Object. Count *William* hath but an eſtate for his life, for there is power for him to make leaſes for lives, which needeth not if it had been an eſtate tail.

Reſp. Abundans cautela non nocet, as the ſaving of the reverſion to the king, which was by this act taken out of him.

Who is the donor here? for the donee by rules of law ought to hold of the donor by owelty of ſervices, which cannot be here.

Object. Chudleigh's caſe, The parliament may be the donor.

Reſp. It may be ſo in caſe of a fee-ſimple, but not in caſe of an eſtate-tail.

The parliament is no corporation, at leaſt not fixt, and therefore cannot be donor.

The earl of *Derby* could not be donor, becauſe he cannot reſerve an eſtate for life to himſelf, and not part with the reverſion; and ſo I pray judgment for the plaintiff.

Holt for defendant. The only queſtion is, Whether the fine of 1659. bar the eſtate-tail? or whether the ſtatute of 34 *H.* 8. reſtrains the ſame?

The meaning of the ſtatute of 34 *H.* 8. appears by the recital in the preamble, *viz. Whereas the king and his progenitors had granted lands to ſeveral perſons in tail, to the intent that the recompence for their ſervice ſhould not only be a benefit to their own perſons, but a continuing profit to the heirs of their bodies, whereby they ſhould have in ſpecial memory the profit they receive by their ſervice, and be thereby encouraged to the like ſervice to their ſovereign.*

By which it appears that the lands in queſtion ſince 4 *Jac.* are now in the ſame, but this fine bars the eſtate-tail.

1. This eſtate is created by 4 *Jac.* and is a new eſtate, and not ſuch an eſtate as is within 34 *H.* 8. for that extends

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to lands ſettled, and to be ſettled by the gift of the crown. And if ſuch a donee of the gift of the crown had before that ſtatute levied a fine, it had barred the iſſue. This * is not an eſtate derived out of the crown, nor grounded upon ſuch conſiderations as are mentioned in the ſtatute. * P. 274.

2. 'Tis not merely a reverſion in the crown which makes the eſtate-tail not to be barred; for if a man purchaſeth an eſtate-tail from the crown, it is not within this ſtatute; but a fine will bar the iſſues notwithſtanding this ſtatute.

3. 'Tis out of the words of the ſtatute in the manner of the creation of the eſtate; for it is not created by the king, but by the parliament. This act hath always received ſtrict conſtruction, and therefore an eſtate made by the king, when he was not king, is out of this ſtatute, *Co. Lit.* 372. And an act of parliament is an extraordinary way to ſettle an eſtate.

4. From the conſideration of this act of 4 *Jac.* wherein there is a proviſo, *That tenant for life ſhall have power to make leaſes or jointures*; but no proviſion for tenant in tail ſo to do; which ſhews that the parliament intended, that tenant in tail could do it, as it is limited by this act, which could not be done by 34 *H.* 8.

Object. This new eſtate in *James* is the ſame eſtate as by the letters patent.

Reſp. It cannot be the ſame, for it would defeat the whole act.

The act hath made theſe alterations:

1. The eſtate for life to *Alice*, which cannot be dower becauſe not mentioned, and hath a continuance only during the eſtate-tail.

2. Count *William* hath an eſtate for life only, whereas he had before an eſtate-tail.

3. All the iſſues of count *William* would have had an eſtate by deſcent, by the letters patent, but now they take by purchaſe. In a *Formedon* they cannot declare upon the letters patent, but upon this act.

Object. There ought to be donor and donee in every eſtate-tail.

Reſp. An act of parliament may create an eſtate without a donor.

Object. The ſaving is to all perſons *præter* the perſon except, &c.

Reſp. The eighth ſon, &c. may be ſaved within this proviſo; but the ſeven ſons are in of another eſtate.

Object.

* P. 275. * *Object.* Conſtruction of an act of parliament ought to be according to equity.

Reſp. This act of 34 *H.* 8. ought not to be favourably conſtrued, becauſe contrary to equity and reaſon of the common law, and reſtrains alienation. *Keilway* 96. *a. pl.* 6. *Lit. ſect.* 360. So the ſtatute of *Weſtm.* 2. *cap.* 1. is to be taken ſtrictly for the ſame reaſon, *Co.* 2 *Inſt.* 335. and therefore it is ſaid, that a fine *ipſo jure ſit nullus*, yet it is a diſcontinuance. And ſo he prayed judgment for the defendant. *Poſt.*

William Scot *verſus* Knapton. *Debt. Error.*

Error. IN debt upon the ſtatutes of 1 *Eliz. cap.* 3. and 23 *Eliz. cap.* 1. for abſenting from church for eleven months. Upon *Nil debet* pleaded, judgment was given in *B. R.* And now the defendant there brought a writ of error. And it was objected by the counſel for the defendant in the writ of error, that ſuch a writ of error did not lie within the ſtatute of 27 *Eliz. cap.* 8. becauſe it is an action *tam quam*; and the words of the ſtatute are *(other than where the queen ſhall be party)* and here the king is party. But reſolved, the writ doth well lie, becauſe the king is not properly party, though he is to have part of the penalty.

26 Febr. 1678.

Felony. London. ſſ. Jur', &c. quod Abrahamus Chiffers nuper de London' labor' quinto die Februarii Anno, &c. triceſimo primo vi & armis, &c. apud London' videlicet in Parochia Sancti Sepulchri in Ward' de Faringdon extra London' præd' duo Collar' ornament' panicilium viril' cum temol' ornat', Anglice vocat' *Mens laced Crevats*, valor ſeptem ſolidor' de bonis & catallis cujuſdam Annæ Charteris Spinſter adtunc & ibidem invent' adtunc & ibidem felonice furat' fuit cepit & aſportavit contra pacem dicti Domini Regis nunc Coron' & Dignitat' ſuas, &c.

Upon a ſpecial verdict the jury find, That on the day, and at the place in the indictment mentioned, *Abraham Chiffer* came to the ſhop of *Anne Charteris* ſpinſter in the ſaid indictment likewiſe named, and aſked for to ſee two crevats in the indictment mentioned, which ſhe ſhewed to him, and delivered them into his hands, and thereupon he aſked the

* P. 276. price of them, to which * ſhe anſwered 7*s.* whereupon the ſaid

ſaid *Abraham Chiſſers* offered her 3*s.* and immediately run out of the ſaid ſhop, and took away the ſaid goods openly in her ſight; But whether this be felony, or not, is the queſtion. And if it ſhall be adjudged felony, we find him guilty; and that the goods were of the value of 7*s.* and that he had no goods or chattels, &c. But if it be not adjudged felony, we find him not guilty, nor that he fled for the ſame.

And I am of opinion, that this act of *Chiſſer* is felony; For that, 1. He ſhall be ſaid to have taken theſe goods *felleo animo*; for the act ſubſequent, *viz.* *His running away with them*, explains his intent precedent; as the ſuing a *Replevin* to get the horſe of another man's, to which he hath no title, is felony, becauſe *in fraudem Legis*, *Co.* 3 *Inſt.* 108. So if an officer cometh to a man, and telleth him that he is outlawed, when the officer knoweth the contrary to be true, and by colour thereof, takes his goods, it is felony. *Dalton's office of ſheriffs, cap.* 121. *fol.* 489. 1 Sid. 254. And the caſe of one *Far*, in which I myſelf was a counſel, Kely 43. was thus; Far *knowing one Mrs.* Steneer *living in St.* Martin's Lane *in* Middleſex *to have conſiderable quantity of goods in her houſe, procured an* affidavit *to be filed in the* Common Pleas, *of the due delivery of a declaration, in an action of* Ejectione firmæ, *in which he was leſſor, though he had no title, and thereupon got judgment, and took out an* Habere facias poſſeſſionem *for the houſe, directed to the ſheriff of* Middleſex, *and procured him to make a warrant to a bailiff to execute the writ, who with* Far *came to the houſe, turned Mrs.* Steneer *out of poſſeſſion thereof, and ſeiſed upon the goods of a great value, and converted them to his own uſe, and upon complaint made by Mrs.* Steneer *to ſir* Robert Hide, *then lord chief juſtice of* B. R. Far *was apprehended by his warrant, and indicted at* Juſtice-Hall *in the* Old Baily, *and found guilty, and hanged; for that he uſed the colour of an action of ejectment, and the proceſs thereupon to execute his felonious intent,* in fraudem Legis.

2. Although theſe goods were delivered to *Chiſſer* by the owner, yet they were not out of her poſſeſſion by ſuch delivery, till the property ſhould be altered by the perfection of the contract, which was but inchoated and never perfected between the parties; and when *Chiſſer* run away with the goods, it was as if he had taken them up, lying in the ſhop, and run away with them. *Vide Hill.* 21 *H.* 7. 14. *pl.* 21. *Bracton* ſays, *Furtum eſt tractatio rei alienæ frandulenta,* * *animo furandi, invito illo cujus res illa fuerit.* * P. 277. Stanford's Pleas of the Crown 25. a.

Samuel

Samuel Dodd, Clerk, *verſus* Ralph Ingleton.

Tithes.
2 Danv. Ab. 596. p. 8.

THE plaintiff being vicar of *Chigwel* in *Eſſex*, exhibited his Engliſh bill in the exchequer chamber againſt the defendant for ſmall tithes, and amongſt the reſt for tithe milk; and upon the hearing a queſtion aroſe, Whether the defendant ſhall pay the tenth part of the milk of his cows every meal, or only every tenth meal? And it was decreed that he ſhould pay every tenth meal intire to the plaintiff; for otherwiſe the plaintiff muſt be forced to keep a ſervant for that ſervice of collecting the milk only, and perhaps the tithe would not amount to a pint a day. The next queſtion was, Whether *de jure* (there being no cuſtom one way or other) the pariſhioner ought to ſend the tithe milk to the vicar to his houſe, or that the vicar ought to fetch it from the pariſhioner? And now 22 *May* 1679. The vicar brought a civilian, one doctor *Raynes*, to argue, whoſe argument was as follows. By the *Jus commune Eccleſiaſticum* which is the canon law, all tithe ought to be brought home to the parſon; and the law is grounded upon the ſcripture. *Malac.* 3. 10. *Bring ye all the tithes into the ſtore-houſe*; and St. *Jerome* gives the rule ſo; and *Linwood l.* 3. *Tit.* 16. *De Decimis Cap. Quia quidam, verbo Colligendis, pag.* 168. *Colonus de jure tenetur non ſolum Decimas hujuſmodi colligere & coacervare, ſed etiam in horreum Sacerdotis afferre.* And this is certain for predial tithes. And ſo ſays *Speculator*, it is for wines. And although there be no expreſs mention of milk, and that milk is here in *England* reckoned amongſt minute tithes; yet in other countries it is a predial tithe.

2. All tithes ought to be paid ſo ſoon as they may be fit for the parſon to receive them; ſo calves at ſuch an age, and other things, as the matter will bear. Now 'twill be very inconvenient if the milk which *de jure* is tithable every meal, ſhall be ſent for by the parſon twice a day, and every time may not be a pint.

3. In the manner of tithing, that which *magis expedit Eccleſiæ*, is to be obſerved, then it is more decent for the pariſhioner to bring, than the parſon to fetch his tithes. Where the law is ſilent, the cuſtom of the places adjacent prevails. * Now here, all the neighbour vicars have their milk brought home to them.

* P. 278.

Upon

Upon hearing this argument the court thought fit for the plaintiff, if he saw cause, to insert all his parishioners, or as many of them as he pleased into his bill; and upon their answers the court would deliver their opinion, because of ascertaining the way of paying tithe milk quite through the parish, to prevent multiplication of suits; but if the plaintiff shall not think fit so to do, the court adjourned this cause till *Michaelmas-Term* to give their opinions; and afterwards, *viz.* 10 *November* 1679. we all agreed that the tithe milk ought to be carried by the parishioners. My opinion was, That it should be delivered at the vicarage-house, because where there is no custom the common law prevails; but my lord chief baron and the other two barons agreed, that it should be delivered in the church-porch, because the neighbouring parishes did so; but that appeared not in the pleadings, but so it was decreed.

Tender of tithe cheese at the house of the parishioner is good, Rolt. 2 Rep. 328. Palmer 341. Wiseman *vers.* Denham. Suggestion, that the parishioner is to pay the tenth quart of milk at the parsonage-house, or at any other place is a good ground for a prohibition, by Popham chief justice, 3 Cro. 609. Austin *versus* Lucas.

John Lisle *versus* John Grey *Esquire*, Thomas Ogle *and* Robert Manners. *Ejectment. Northumberland.*

Trin. 22 Car. 2. Rot. 141. B. R. *In a Writ of Error in the* Exchequer Chamber.

6 Law Rep 328

THE plaintiff declares of the demise of *William Lisle* of four messuages, two hundred acres of land, two hundred acres of meadow, two hundred acres of pasture, and three hundred acres of moor in *Acton* in the parish of *Felton*. Upon not guilty pleaded, the jury gave a special verdict,

Uses. 2 Lev. 223. Pollexf. 582. 2 Jon. 114. 2 Show. 6. Postea 302, 315.

14 Law J. N.S. 27. C.P.

That before the trespass and ejectment, one *John Lisle* was seised in fee of the tenements in question; and so being thereof seised 15 *August* 15 *Car.* 1. an indenture was made between the said *John Lisle* of the one part, *John Robson* and *Thomas Lorain* of the other part, and inrolled duly within six months in the court of chancery, according to the form of the statute. The tenor whereof followeth in these words, *viz.*

* This indenture made the fifteenth day of *August* in the fifteenth year of the reign of our sovereign lord *Charles*, by the grace of God, king of *England*, *Scotland*, *France* and *Ireland*, defender of the faith, &c. between *John Lisle* of *Old Felton* alias *Little Felton* in the county of *Northumberland*,

* P. 279.

berland, gent. of the one part, and *John Robſon* clerk, one of the prebendaries of the cathedral church of *Durham*, and *Thomas Lorain* of *Kirkharle* in the county of *Northumberland* gent. of the other part, Witneſſeth, that the ſaid *John Liſle* for the ſettling and eſtabliſhing of all the meſſuages, farms, lands, tenements, and all other the hereditaments hereafter mentioned to be, remain and continue in the blood of the ſaid *John Liſle* in ſuch manner and ſort as hereafter is herein and hereby limited and expreſſed, ſo long as it ſhall pleaſe Almighty God to continue the ſame; and for and in conſideration of the natural love and affection which he beareth unto thoſe, unto whom the eſtates hereafter are limited; and for the advancement of *Edward Liſle* his ſon, and others of the blood hereafter-mentioned, He the ſaid *John Liſle* doth hereby, for him and his heirs, covenant, grant and agree to and with the ſaid *John Robſon* and *Thomas Lorain* and their heirs, that he the ſaid *John Liſle* and his heirs ſhall and will from henceforth ſtand and continue ſeiſed of and in all that whole meſſuage and tenements, called *Felton* alias *Little Felton*, within the pariſh of *Felton* in the ſaid county of *Northumberland*, late parcel of the poſſeſſions of the monaſtery of *Brentburn* in the ſaid county of *Northumberland*, together with all and ſingular the appurtenances and premiſſes to the ſame belonging, or being accounted, accepted, reputed or taken to be part, parcel or member thereof, or therewith, or heretofore uſed, occupied, poſſeſſed or enjoyed as part, parcel or member thereof; and all that the manor and lordſhip of *Acton* alias *Ackton* in the ſaid county of *Northumberland*, commonly called and known by the name of the *North* and *South* parts of the town of *Acton* aforeſaid, together with all and ſingular tofts, crofts, woods, underwoods, mines, quarries, lands, meadows, feedings, commons and common of paſture; and all and ſingular the appurtenances whatſoever to the ſaid manor or lordſhip of *Acton* alias *Ackton* belonging or appertaining, or therewith uſed, occupied or enjoyed as part, parcel or member thereof, together with two cloſes called or known by the names of the *Middle-Wood* cloſes; and alſo one meſſuage late in the tenure or occupation of one *Robert Car*, or his aſſigns, * with their and every of their appurtenances to the ſame belonging or in any wiſe appertaining, or therewith uſed, occupied or enjoyed as part, parcel or member thereof, with all other the ſaid *John Liſle* his lands, tenements and hereditaments whatſoever, with the appurtenances in the county of *Northumberland* aforeſaid, and to and for the uſes, intents and purpoſes hereafter limited, and to

* P. 280.

and

and for no other uſe, intent or purpoſe whatſoever, that is to ſay, To and for the uſe and behoof of the ſaid *John Liſle*, for and during the term of his natural life, without impeachment of and for any manner of waſte, and after his deceaſe, to and for the uſe and behoof of the ſaid *Edward Liſle*, for and during the term of his natural life, and after his deceaſe, to and for the uſe and behoof of the firſt ſon of the ſaid *Edward Liſle* lawfully to be begotten, and to the uſe and behoof of the heirs males of the body of the firſt ſon lawfully to be begotten; and for default of ſuch iſſue, to the uſe and behoof of the ſecond ſon of the ſaid *Edward Liſle* lawfully to be begotten, and the heirs males of the body of the ſaid ſecond ſon lawfully to be begotten; and for default of ſuch iſſue, to the uſe and behoof of the third ſon of the body of the ſaid *Edward Liſle* lawfully to be begotten, and the heirs males of the body of the ſaid third ſon lawfully to be begotten; and for default of ſuch iſſue, to the uſe and behoof of the fourth ſon of the body of the ſaid *Edward Liſle* lawfully to be begotten, and the heirs males of the body of the ſaid fourth ſon lawfully to be begotten; and ſo ſeverally and reſpectively to every of the heirs male of the body of the ſaid *Edward Liſle* lawfully to be begotten, and the heirs males of the body of ſuch heirs males lawfully to be begotten, according to their ages and ſeniorities; and for default of ſuch iſſue, to the uſe and behoof of *William Liſle* of *Warkeworth* in the ſaid county of *Northumberland* gent. for and during the term of his natural life, and after his deceaſe, to the uſe and behoof of the firſt ſon of the body of the ſaid *William Liſle* lawfully to be begotten, and the heirs male of the body of the ſaid firſt ſon lawfully to be begotten; and for default of ſuch iſſue, to the uſe and behoof of the ſecond ſon of the body of the ſaid *William Liſle* lawfully to be begotten, and the heirs male of the body of the ſaid ſecond ſon lawfully to be begotten; and for default of ſuch iſſue, to the uſe and behoof of the third ſon of the ſaid *William Liſle* lawfully to be begotten, and the heirs male of the body of the ſaid third ſon lawfully to be begotten; and for default of ſuch iſſue, to the uſe and behoof of the fourth ſon of the body of the ſaid *William Liſle* lawfully to be begotten, * and the heirs male of the body of the ſaid fourth ſon lawfully to be begotten; and ſo ſeverally and reſpectively to every of the heirs male of the body of the ſaid *William Liſle* lawfully to be begotten, and the heirs males of the bodies of ſuch heirs males lawfully to be begotten, according to their ages and ſeniorities; and for default of ſuch iſſue, to the uſe and behoof

* P. 281.

behoof of the right heirs of the ſaid *Edward Liſle* for ever. *Provided always*, and it is hereby declared by and between all the parties to theſe preſents; And the ſaid *John Liſle* party to theſe preſents, for him and his heirs, doth covenant, grant and agree to and with the ſaid *John Robſon* and *Thomas Lorain* and their heirs; That if it ſhall happen the ſaid *Edward Liſle*, ſon of the ſaid *John Liſle*, party to theſe preſents, do die without iſſue male of his body lawfully begotten, that then the ſaid *John Liſle*, party to theſe preſents, and his heirs ſhall and will ſtand ſeiſed of all and ſingular the manor, lands, tenements and hereditaments aforeſaid, with their and every of their appurtenances, to the uſe, intent and purpoſe, that they ſhall and will raiſe and levy out of the rents, iſſues and profits thereof, the ſeveral ſums of 100*l.* a-piece for each and every of the daughters of the ſaid *Edward Liſle*, to be paid after the ſame be ſo levied, to the eldeſt firſt, and ſo in order, according to their ſeveral ages and ſeniorities. *Provided always*, that if the ſaid *John Liſle*, party to theſe preſents, ſhall and do at any time hereafter during his life-time, declare unto the ſaid *John Robſon* and *Thomas Lorain*, or either of them, that he is intended to alter and revoke any uſe, truſt, clauſe or limitation in or to theſe preſents, by his writing indented by him ſealed and delivered in the preſence of two or more ſufficient witneſſes, that then ſuch addition, alteration or revocation by him ſo made, ſhall ſtand and be good and effectual in law to all intents and purpoſes; any thing herein contained to the contrary in any wiſe notwithſtanding.

By virtue whereof, and of the ſtatute for transferring uſes into poſſeſſion, the ſaid *John Liſle* became ſeiſed of the tenements aforeſaid in his demeſne as of freehold, for term of his life, remainder as is before limited, and ſo being ſeiſed had iſſue *Edward Liſle* his eldeſt ſon.

That the ſaid *John Liſle* 1 *March* 17 *Car.* 1. died ſo ſeiſed; after whoſe death the ſaid *Edward* entered and became thereof ſeiſed in his demeſne as of freehold, for his life, the remainder as aforeſaid, and ſo being thereof ſeiſed, the ſaid *Edward* had iſſue only a daughter ſtill alive.

* P. 282. * That the ſaid *Edward Liſle* 30 *September* 1694. made this indenture following in theſe words:

This indenture made the 30th day of *September* 1694. between *Edward Liſle* of *Acton* in the county of *Northumberland* gent. of the one part, and *Thomas Forſter* of *Etherſton* in the ſaid county of *Northumberland*, *John Forſter*, ſecond ſon of ſir *Mathew Forſter* of *Etherſton* aforeſaid in the aforeſaid county, gent. of the other part, witneſſeth, that the

the ſaid *Edward Liſle* for divers eſpecial and good cauſes and conſiderations him thereunto moving, Hath given, granted, bargained, ſold, aliened, infeoffed and confirmed, and by theſe preſents doth freely and fully give, grant, bargain, ſell, alien, infeoff and confirm unto the ſaid *Thomas Forſter* and *John Forſter*, their heirs and aſſigns, all that meſſuage, tenement or farm called and known by the name of *Old Felton*, ſituate, lying and being in *Little Felton* in the pariſh of *New Felton* in the ſaid county of *Northumberland*, within the tenure or occupation of the ſaid *Edward Liſle* or his aſſigns, And all that the town, townſhip or manor of *Acton* alias *Ackton* with the appurtenances, containing as well all that part of the ſaid manor called the *South Part* of the town, townſhip or manor of *Acton*, as that part which is called by the *North Part* of the town, townſhip or manor of *Ackton* in the ſaid county of *Northumberland*, and all and ſingular houſes, edifices, buildings, barns, ſtables, byers, backſides, outhouſes, gardens, orchards, meadows, feedings, paſtures, leaſows, commons and common of paſture, woods, underwoods, mines, quarries, eaſements, profits, commodities and emoluments whatſoever to the ſaid meſſuage, tenement or farm, and to the ſaid town, townſhip or manor, or either of them belonging or appertaining, or with the ſame or any part thereof, now or at any time heretofore held, uſed, occupied and enjoyed as part, parcel or member of the ſaid meſſuage, tenement or farm, or of the ſaid town, townſhip or manor, or either of them, or of any part of them, or either of them, together with all and ſingular the writings, charters, evidences, eſcripts, eſcrowls, deeds, tranſcripts of fines, exemplifications of records and muniments whatſoever, of or concerning the aforeſaid premiſſes, or part thereof (amongſt other things,) all which ſaid writings, charters, evidences, eſcripts, eſcrowls, deeds, tranſcripts of fines, exemplifications of records and muniments, the ſaid *Edward Liſle* doth for him, his heirs, executors and adminiſtrators, covenant, grant and agree to and with the ſaid *Thomas Forſter* and * *John Forſter*, and their heirs, that he the ſaid *Edward Liſle*, and his heirs, ſhall and will, at and upon the enſealing and delivery hereof, deliver, or cauſe to be delivered to the ſaid *Thomas Forſter* and *John Forſter*, and their heirs, undefaced and uncancelled, to have and hold the ſaid meſſuage, tenement or farm, &c. unto the ſaid *Thomas Forſter* and *John Forſter*, their heirs and aſſigns for ever. And farther, He the ſaid *Edward Liſle* and his heirs, the ſaid meſſuage, &c. to the ſaid *Thomas Forſter* and *John Forſter* their heirs and aſſigns,

* P. 283

againſt all perſons whatſoever will for ever warrant and defend by theſe preſents.

That the ſaid laſt mentioned indenture was executed by livery and ſeiſin.

That in *Hillary Term* 1649. A common recovery was ſuffered of the premiſſes, wherein *Ralph Foſter* gent. was demandant, the ſaid *Thomas Forſter* and *John Forſter* tenants, and the ſaid *Edward Liſle* vouchee, and vouched the common vouchee.

That the ſaid *Edward Liſle* died 1 *May* 1674. without any iſſue but his ſaid daughter.

That by and at the death of the ſaid *Edward Liſle*, ſon of the ſaid *John Liſle*, all the eſtates and remainders in the indenture aforeſaid, bearing date 15 *Auguſt* 15 *Car.* 1. limited, and which preceded the limitation to *William Liſle*, named in the ſaid indenture and now leſſor of the plaintiff, did end and determine.

That the ſaid *William Liſle* was couſin of the whole blood of the ſaid *John Liſle*.

That the ſaid *William Liſle* after the death of the ſaid *Edward Liſle*, 20 *January* 28 *Car.* 2. did enter upon the poſſeſſion of the ſaid *John Grey*, *Thomas Ogle* and *Robert Manners*, and became ſeiſed *prout lex poſtulat*, and made the leaſe to the plaintiff, who entered and was poſſeſſed until the defendants ejected him. And if for the plaintiff, for the plaintiff, &c.

Judgment was given in *B. R.* for the plaintiff; and now the defendant brings a writ of error.

Pollexfen for the plaintiff in the writ of error.

The queſtions are two, 1. Whether by the conveyance of 15 *Auguſt* 15 *Car.* 1. *Edward Liſle* have an eſtate-tail?

2. If he hath not, then whether the plaintiff hath any title conſidering the proviſo?

P. 284. * *As to the firſt*, The caſe is no more but this.

Lands are limited to the uſe of Edward Liſle *for his life, the remainder to his firſt, ſecond, third and fourth ſons ſucceſſively, and the heirs male of their reſpective bodies; and ſo ſeverally and reſpectively to every of the heirs male of the body of the ſaid* Edward, *and the heirs male of the body of ſuch heirs male, according to their ages and ſeniorities, the remainder to* William Liſle, &c. Edward *ſuffers a recovery, and dies without iſſue male.*

And I conceive that *Edward* had an eſtate-tail, and ſo the recovery well ſuffered to the uſe of the *Forſters* and their heirs.

It is agreed on all hands, that where an eſtate is limited to

to a man for life, and afterwards to the heirs of his body, the heirs are in by diſcent and not by purchaſe, *Co. upon Lit.* 22. *b.* 1 *Co.* 104. *a.* 11 *Co.* 79. *b.* *Lewis Bowle*'s caſe, which is in effect the ſame with this in queſtion.

Object. Here it is to the heirs male of the body of *Edward*, and the heirs male of the body of ſuch heir male.

Reſp. The addition of thoſe words make no alteration, but are only words of abundance, and are comprehended within the firſt words, and are of the ſame nature; and ſo is *Shellie*'s caſe.

'Tis not like to *Archer*'s caſe, for there the limitation is to the heir in the ſingular number.

Object. The words are relative, and ſo ſeverally and reſpectively to every of the heirs male of the body of *Edward*.

Reſp. We are upon the conſtruction of a deed, and not of a will, and therefore rules in limitation of eſtates ought to be here obſerved.

The word *(heirs)* is a term of art in the law, and hath an eſtabliſhed ſenſe; and *Littleton* ſays, it is the ſole word which paſſeth an inheritance.

There are certain words which in the law are appropriate to ſome particular purpoſe, *Coke upon Littleton* 9. *a.* And this word *(heirs)* is ſo appropriate to an eſtate of inheritance, 1 *Co.* 103. *b.* *Shellie*'s caſe. From which we may infer, that we cannot alter the legal ſignification of the word *(heirs)* and conſtrue it to ſignify ſons or iſſue.

Object. This is a conveyance by way of uſe, which may be conſtrued with equal favour as a will.

5 *E.* 4. 7. When uſes have gained the reputation of inheritances deſceadible, the common law directs the deſcent of them, 4 Co. 22. a.

Reſp. Uſes are now reduced to the rules of the common law. 1 *Co.* 87. *b.* *Corbet*'s caſe. *Winch.* 60. 1 *Rol. Abr.* 837. *R. pl.* 1. and 2. *Tit. Eſtate.* A feoffment to the uſe of *A.* and his iſſues male of his body, makes not an eſtate-tail, for want of the word *heirs*.

* And there is no caſe to be found in law, where the word *(heirs)* is taken for iſſue or ſon; And in this caſe ſhould heir be taken for iſſue or ſon, here would be a very great alteration in point of limitation, for the fifth ſon muſt take by name of ſon. * P. 285.

1. The word *(ſo)* alters not the caſe; and if the interpretation of a deed ſhould be as of a will, many ſuits would be upheld by reaſon of the incertainty of the law in ſuch caſes.

2. The operation of the proviſo is out of doors, becauſe it is found in the verdict, that all the eſtates precedent to the eſtate of *William Liſle* are determined.

Levinz for the defendant in the writ of error. *Edward* hath but an eſtate for life, becauſe, 1. 'Tis a conveyance by way of uſe which was originally but a truſt, and an equitable thing, and therefore ought to be favourably conſtrued.

2. The intent of the father was plainly contrary; for why ſhould he limit no farther than to his fourth ſon? and it was not intended that *Edward* ſhould have any other eſtate but for life in poſſeſſion, becauſe power is provided for him to raiſe portions for his daughters, which need not have been if he have an eſtate-tail, for he could do it by a common recovery.

3. 'Tis not a limitation to the heirs male only, but to every of them, according to their ſeniority.

4. 'Tis to the heirs male of thoſe heirs male. And ſo prays judgment for the defendant. *Adjournatur. Poſt.*

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* P. 286. * Term. Trin. 31 Car. 2. 1679.

Murrey *verſus* Eyton. *Antea* 260.

Eſtate.
2 Jon. 237.
Pollexf. 491.
Skin. 95.
2 Show. 104.
Poſtea 319, 338.

POLLEXFEN for the plaintiff. The eſtates limited by the act of 4 *Jac.* are the ſame eſtates in ſubſtance with what were limited by the letters patent, and vary only in circumſtances, and therefore *Ferdinando* was ſeiſed in tail under the patent, and *Alice* intitled to dower under him.

The firſt alteration objected is the limitation to *Alice* for her life.

Reſp. That may conſiſt with the eſtate in the patent, for it is but for her life, and it is but a third part, which is equivalent to the dower ſhe ſhould have by the eſtate in the patent.

The ſecond alteration is, that count *William* hath an eſtate-tail by the patent, but now by the act he hath but an eſtate for life, with remainders to his ſons in tail.

Reſp. By the firſt eſtate he had no other advantage than he

he hath by the eſtate for life, and therefore there is no ſubſtantial alteration.

The third alteration is, that here are by the act limitations to other perſons, *viz. Edward Stanley, &c.*

Reſp. Thoſe other perſons were to have ſucceeded by the patent.

Object. The proviſo to make leaſes and jointures.

Reſp. As to the power to make leaſes, tenant in tail could have made ſuch leaſes before. And as to the power to make jointures, it is to be only of the third part of what he ſhall be in poſſeſſion, and ſo is no more than dower.

Object. Coke on Litt. 372. *b.* A recovery ſuffered by tenant in tail, where the reverſion was in the crown, barred the eſtate-tail before the ſtatute of 34 *H.* 8. *cap.* 20. and ſo it was agreed in 33 *H.* 8. as it is *Br. tit. Tail* 41. 40 *Aſſ. pl.* 36.

Reſp. The lord *Brook*, who was made chief juſtice 2 *Mar.* and was either a judge, or very near it, and at the height of his practice in 38 *H.* 8. about which time the caſe is cited * by the lord *Coke*, is of another opinion. *Br. Aſſurances* 6. *Fines levie de terres* 121. and he lived nearer the making the ſtatutes of 32 *H.* 8. and 34 *H.* 8. So is 1 *Anderſ.* 46. *pl.* 118. And by the penning of the ſtatute of 34 *H.* 8. it appears that no notice is taken therein of any fine, but only of a recovery, which ſhews that a fine extends not to an eſtate-tail where the reverſion is in the king. * P. 287.

Serjeant *Weſton* for the defendant. The eſtate is totally altered by the act of parliament, for now the eſtate created by that act is drawn out of the eſtate-tail which was created by the letters patent, and not out of the reverſion in the crown, and count *William* had a reverſion in him expectant upon this new eſtate. And an eſtate-tail is capable to have another eſtate drawn out of it, either by wrong or by right, which may out-laſt the old eſtate. Tenant in tail bargains and ſells; it is a good eſtate to laſt till the iſſue enters. And whatſoever thing may be done where the reverſion is in a common perſon, the ſame thing may be done by act of parliament in caſe of a king.

Object. If here be a new eſtate, who is the donor? Not the act of parliament, becauſe a parliament is no corporation, and ſo cannot be ſaid to be donor.

Reſp. An act of parliament may be donor by way of giving a penal judgment, as in caſe of forfeitures. 2. By way of execution of an agreement, and either the act is donor,

and

and tenant in tail is donor proportionably, as in the ſtatute of uſes; and here *William* is the donor.

Object. The old and new eſtate came both into one perſon, *viz.* count *Charles*, and ſo he could not alien the one without the other.

Reſp. It is all one as if the eſtates had been in divers perſons, and *Charles* here had power over the new eſtate-tail by fine, feoffment, *&c.* but not over the old eſtate-tail.

Object. This is *Petitio Principii*, for whether he hath any power over either of the eſtates is the queſtion.

Reſp. The eſtate granted by *Charles* ſhall ariſe out of the eſtate which is moſt mediate to the gift, *viz.* the eſtate-tail, and not out of the reverſion in the crown which is the old reverſion.

The ſtatute of 34 *H.* 8. being diſcharged by the act of 4 *Jac.* the lands became alienable at all times afterwards, as *Dumport*'s caſe, where a condition which reſtrains alienation is once diſpenſed with, is for ever after deſtroyed.

* P. 288. * 14 *Car.* 2. *Gardiner*'s caſe, upon a ſpecial verdict, king *H.* 8. gives to *Michael Stanhope* and his wife, and the heirs of their bodies, certain lands, *Michael* dies, the lands deſcend to *Thomas Stanhope*, his ſon and heir, who petitions the queen to grant the reverſion to ſome perſons in fee, to the intent the ſaid *Thomas Stanhope* may make a leaſe for 99 years by way of mortgage, and enters into a recognizance to the queen, conditioned that nothing ſhall be done whilſt the reverſion is out of the crown, prejudicial to the queen; the queen conveys the reverſion to the lord *Burleigh* and ſir *Walter Mildmay* in fee. *Thomas Stanhope* makes the leaſe, then ſuffers a common recovery; the ſaid lord *Burleigh* and *Walter Mildmay* reconvey to the queen. The queſtions were 1. If the grant to the lord *Burleigh* and ſir *Walter Mildmay* was void, for the queen was deceived in her grant; and reſolved the grant was good, and the queen not deceived. 2. Whether the queen being in by the re-grant, ſir *Stanhope*, the ſon of *Thomas*, was now reſtrained from aliening: And reſolved he was not, becauſe the force of the ſtatute of 34 *H.* 8. was diſcharged. *Et adjournatur. Poſt.*

Player

Player *verſus* Vere.

THE defendant being ſued in London brings an *Habeas Corpus* directed to the mayor, aldermen and citizens of the ſaid city, who make this return, *viz.* By law. 1 Danv. Ab. 734. p. 5. Antiqua Civitas. 1 Vent. 21. 1 Sid. 284. 2 Keb. 27, 490, 501. Poſtea 324.

The city of *London* is, and hath been time out of mind an ancient city, and that the mayor and commonalty and citizens of the ſaid city are, and time out of mind have been a body politick and corporate, and time out of mind have been known by the name of the citizens of the city of *London*, barons of the, *&c.*

14 Law Ins. 213-69

And that in the ſame city there is, and time out of mind hath been a cuſtom uſed and approved of, *viz.*

That the mayor and commonalty and citizens of the city of *London* by themſelves and ſuch other perſon or perſons, as by the mayor and aldermen of the city of *London* aforeſaid for the time being, by the aſſent of the commons of the ſame city have been appointed, have and have had right to order and diſpoſe of carrs, carts, carrooms, carters and carmen, and of all other perſon and perſons whatſoever working any carrs or carts within the city of *London* and liberties thereof according to the cuſtom there. Cuſtom to order carts.

* P. 289.

* And that there is, and hath been time out of mind a cuſtom, that if any cuſtom be defective, or that there ſhall be any thing in the city of new-emerging, where before there was no remedy, the mayor and aldermen with the aſſent of the commonalty may appoint, and have appointed and ordained fit and convenient remedy and agreeable to reaſon for the profit of the citizens of the ſame city and other the ſubjects of the king thither reſorting, when and as often as they ſhould think fit, ſo as ſuch ordinance were profitable for the king and his people, *& bonæ fidei conſon'* and reaſonable. Cuſtom to alter and amend a by-law.

That the ſaid cuſtoms are confirmed by parliament in the ſeventh year of king *R.* 2.

That in a common council held 2 *April* 1677. It was enacted, as followeth.

For the better and more regular ordering and diſpoſing of all carrs, carts, carrooms, carters and carmen, and all other perſons whatſoever that ſhall hereafter work any carr or carts within this city or the liberties thereof for hire, Be it enacted and ordained by the right honourable the lord mayor, aldermen and commons in common council aſſembled, and Act of common council.

by

Repeal of a former by-law.

by the authority of the ſame, That one act of common council made in the mayoralty of ſir *John Lawrence* knight, for the government of carrs, carts, carrooms, carters and carmen, And every clauſe, article and thing therein contained, be from henceforth repealed; And the ſame is hereby repealed and made void to all intents and purpoſes. And be it farther enacted and declared by the authority aforeſaid, that the preſident and governors of *Chriſt's Hoſpital* ſhall have the rule, overſight and government of all ſuch carrs, carts, carters and carmen, and of all other perſons whatſoever, that do or ſhall hereafter work or uſe any carrs or carts within the city of *London*, or the liberties thereof, for hire, according to the rules, directions and proviſions in this preſent act mentioned and compriſed. And the preſent trade of this city being ſeriouſly conſidered, and to the end that all the ſtreets and lanes of this city may not be peſtered with carrs or carts, and his majeſty's liege people may have free paſſage by coach or otherwiſe through the ſaid ſtreets and lanes: Be it enacted, That no more than 420 carts ſhall be allowed or permitted to work for hire from one place to another within this city or the liberties thereof, and that each of them ſhall be made known by having the city arms upon the ſhaft of every ſuch cart, in a piece of braſs, with the number upon it, and that 17*s.* 4*d.* *per annum* * and no more ſhall be received and paid for a carroom, and 20*s.* and no more, or greater fine, upon any admittance or alienation of a carroom, which 17*s.* 4*d.* *per annum*, and 20*s.* aforeſaid, is to be wholly applied towards the relief and maintenance of the poor orphans harboured and to be harboured in the ſaid *Chriſt's Hoſpital*. And that if any perſon or perſons ſhall preſume to work any carrs or carts within the ſaid city and liberties for hire by himſelf or ſervant, not being duly allowed as aforeſaid, ſuch perſon or perſons for every time ſo offending ſhall forfeit and pay the ſum of 13*s.* 4*d.* to be recovered, received or obtained as is hereafter mentioned.

Chriſt's Hoſpital to have the ordering of carrs.

* P. 290.

And be it farther enacted by the authority aforeſaid, That there ſhall not be hereafter any car, cart or cars permitted or allowed, to any wharf, wharfingers, woodmongers or retailers in fuel, or kept or worked by any wharfinger or any retailer or retailers in fuel after the 24*th* day of *June* next. But ſuch car, cart or cars as are part of the ſaid number of 420 cars licenſed by the ſaid preſident and governors which are allowed the carriage of all wood, coals and other fuel within the ſame city and liberties thereof at ſuch rates, and in all other reſpects, as other goods and

and commodities are uſed to be carried; and not otherwiſe. And if any wharfinger, woodmonger or other retailer in fuel, ſhall preſume to keep and work any cart or car contrary to the true meaning hereof, ſuch perſon and perſons for every time ſo offending ſhall forfeit and pay for the firſt offence the ſum of 13*s.* 4*d.* to be recovered and obtained as is hereafter mentioned, and for the ſecond and every other offence afterwards, double the ſaid ſum of 13*s.* 4*d.* to be alſo levied as is hereafter expreſſed.

Provided nevertheleſs, That it ſhall and may be lawful for every perſon and perſons with his and their own, or with any other car, cart or cars, to bring out of the country to the ſaid city, or to fetch from the ſaid city into the country any coals, fuel or other goods, wares and merchandizes. And that it ſhall be lawful for every retailer of fuel to bring home to his or their own houſes or wharfs all manner of fuel by and with his and their own, or with any other car, carts or cars.

And be it farther enacted, That ſuch as have any carroom or carrooms duly licenſed and allowed as aforeſaid, ſhall not directly nor indirectly let them out for hire to be worked by any others at any time hereafter without the approbation and allowance of the ſaid preſident and governors of *Chriſt's Hoſpital* * for the time being firſt obtained, and atteſted in writing under the ſaid preſident's hand; To the end that none may be admitted to work any car, but ſuch as ſhould be found of civil carriage and able, and meet for that employment, upon pain that every perſon ſo offending therein ſhall forfeit the ſum of 10*s.* a day for every day he ſhall let to hire the ſaid car, to be recovered as is hereafter mentioned; And that the prices of carriage may be made moderate as well for the people as the carmen, It is enacted, That forthwith this preſent year and hereafter always from time to time, as often as occaſion ſhall require, reaſonable rates and prices of carriages within this city and liberties ſhall be ſet and appointed by the court of aldermen, they calling to their aſſiſtance ſuch of the commons as they ſhall think fit for their information therein. And the ſaid prices to be printed and ſet upon poſts in publick places, and a copy thereof to be always carried about by every reſpective carman for the ſatisfaction of all perſons that ſhall deſire to ſee the ſame. And if any carman ſhall demand and take more than according to ſuch rates and prices ſo to be ſet down, ſuch perſon and perſons ſo offending ſhall forfeit and pay for every ſuch offence the ſum of 10*s.* to be had and recovered as is hereafter mentioned. It is hereby farther

* P. 291.

farther enacted, That if any perſon or perſons authorized to work any car or cars by himſelf or ſervant ſhall neglect or refuſe duly to pay the ſaid yearly rent of 17*s.* 4*d.* a year to the ſaid preſident and governors, for the uſes aforeſaid for every the ſaid car and cars, as is before mentioned, the carroom that is the licence of ſuch perſon or perſons to work ſuch car or cars be ſuſpended, and ſuch perſon or perſons be diſabled to work any longer by virtue of the ſame licence, until he or they ſhall conform to the payment of the ſaid duty of 17*s.* 4*d.* reſpectively. And if any perſon or perſons, for the cauſe before mentioned being ſo diſabled, ſhall preſume before conformity after ſuch diſallowance to uſe or work any car or cars either by him or themſelves, or by his or their ſervant or ſervants, agent or agents, then every ſuch perſon and perſons ſhall reſpectively forfeit and loſe the ſum of 13*s.* 4*d.* for every time they ſhall ſo work, to be recovered and applied as is hereafter mentioned.

And laſtly it is enacted, That all penalties, pains and forfeitures in and by this act before limited and appointed, ſhall and may be levied by diſtreſs of the goods of the perſon ſo offending in the ſaid city to be found or recovered by action of debt, bill or information in the name of the chamberlain of this city for the time being, in his majeſty's
* P. 292. court holden before * the lord mayor and aldermen of the ſaid city in the chamber of the *Guildhall* of the city of *London*, and after recovery thereof, one moiety after charges deducted ſhall be to the informer, and the other moiety to the poor of *Chriſt's Hoſpital* in *London*, to be employed for and towards their relief. In all which ſuits to be brought by this act, the chamberlain ſhall, in caſe he do recover, be allowed his ordinary coſts and charges to be expended in and for recovery of all ſuch forfeitures againſt the offender and offenders. And in caſe upon a trial the verdict ſhall paſs for the defendant, or in caſe the party ſhall be nonſuit or diſcontinue his ſuit, in every ſuch caſe the defendant ſhall alſo recover his reaſonable coſts.

Provided always, and be it enacted by the authority aforeſaid, That no perſon or perſons hereafter to be employed in taking care for the putting of this act in execution, as a ſtreetman or other officer, ſhall be allowed to have any carroom within the city of *London* or the liberties thereof; any thing in this act, or any other law, uſage or cuſtom of this city, to the contrary in any wiſe notwithſtanding.

They farther certify, That before the coming of the writ of *Habeas Corpus*, the defendant was taken in the ſaid city,

city, and impriſoned in the cuſtody of the ſheriffs thereof by virtue of an original bill of debt upon demand of 13*s.* 4*d.* againſt him 2 *Novemb.* 29 *Car.* 2. upon the ſaid act before the mayor and aldermen in the chamber of the *Guildhall* of the ſaid city, according to the cuſtom of the ſaid city, which ſaid original bill doth ſtill there depend undetermined.

Thompſon for the defendant. That here ought no *Procedenda* to be granted, but that the defendant may be diſcharged from the action. This writ is a *Habeas Corpus* to remove a cauſe out of an inferior court, and if it appears that the plaintiff hath not cauſe of action, or that this court hath juriſdiction of the cauſe, no *Procedendo* ought to be granted.

I hold, 1. This by-law is unreaſonable and void, and not warrantable by the cuſtom.

2. The defendant is not within the penalty of it.

3. This court is well poſſeſſed of the cauſe.

As to the firſt, By this cuſtom alledged, the mayor and aldermen have no power to reſtrain the number of carts, or to impoſe fines.

All by-laws to reſtrain liberty or trade are void. 11 *Co.* 53.

The taylors of *Ipſwich* caſe, *Moor* 576. *pl.* 796. *Davenant* verſus *Hardies*, 1 *Roll. Abr.* 364. *A. pl.* 6.

* *M.* 29 *Eliz. B. R.* A by-law in *London*, That none ſhould ſell ſand which was not taken out of the *Thames*, reſolved void. And there was a by-law 42 *Eliz.* to this very purpoſe adjudged void, ſave only that here men may carry their own goods. 1 *Roll. Abr.* 364. *pl.* 5. *Pain* verſus *Haughton*, and 24 *Car.* 2. *B. R. Player* verſus *Bradnox.* This cuſtom was returned upon a *Habeas Corpus*, and no *Procedendo* allowed. * P. 293.

This by-law hinders the woodmonger from following their trades; for they muſt uſe one of the 420 cars; and by the ſame reaſon that they may appoint 420. they may appoint but 20. or more or leſs, and may impoſe what fine they pleaſe, and what rent, *&c.* They may as well reſtrain brewers, tallow-chandlers, hackney-coachmen.

Object. Reſpect ought to be had to the city of *London.*

Reſp. 'Tis true, but they are not to make by-laws prejudicial to the people.

As to the 2d, Admitting this by-law to be good, yet this defendant is not within the penalty thereof, for that it binds none but freemen, citizens and inhabitants, and it doth not appear that he is a freeman, citizen or inhabitant. 1 *Bulſt.* 11. *Franklin* verſus *Green.* In the caſe of the butchers. The plaintiff hath not ſet forth the cuſtom, but declares upon the by-law as upon an act of parliament.

As

As to the 3d, This court is poſſeſſed of the cauſe. There is a difference where a *Habeas Corpus* is to remove a cauſe grounded upon a cuſtom which cannot be taken notice of in this court, as for calling a woman whore, *&c.* and where this court hath cognizance, as in this caſe; for an action of debt will lie here upon a by-law made in any place.

Object. This action is for a duty under 40*s.* and ſo not ſuable here by the ſtatute of *Glouceſter cap.* 8.

Reſp. That ſtatute extends not to this court, for the words of the writ upon the ſtatute are, That Pleas *vi & armis* cannot be ſued *in minori Curia quam coram nobis vel alibi coram Juſticiariis noſtris ad mandatum noſtrum, &c. Regiſt. Orig.* 111. *b. F. N. B.* 46, & 47. and ſo the court of exchequer is excluded.

Sir *George Geoffreys* recorder of *London contra.* He firſt anſwers the objections made to the return.

1. *Object.* That it is not alledged, that the defendant is a citizen, freeman or inhabitant.

Reſp. This objection was made to the return of the by-law concerning the *Eaſtland* company, and ruled that 'twas well enough.

* P. 294. * 2. As to the ſetting forth of the cuſtom in the declaration, it need not, becauſe the citizens are bound to take notice thereof.

3. This court is not poſſeſſed of the cauſe, becauſe this duty is to be ſued for in *Guildhall,* and not here or elſewhere.

Though the by-law may be nought for the fine, it may be good for the rent; for a by-law may be good for one part and bad for another. As to the number, if they cannot be reſtrained, the ſtreets would be peſtered. And by-laws of the like nature in *London* have been here or in the other courts allowed, as, *That none but freemen ſhall exerciſe a trade in any ſhop,* and ſo is ſuch a by-law good in any petty corporation, 8 *Co.* 121. *Wagoner's* caſe. And it ſhall not be preſumed that the magiſtrates will do wrong. *Regiſt.* 105. The cuſtom of *Rippon, That none ſhould exerciſe the trade of a dyer without the licence of the archbiſhop of* York, *lord of the ſaid town.* 34 *H.* 6. *Andrew Devene* was committed for exerciſing the trade of a common broker, not being licenſed and ſworn; he brought an *Habeas Corpus,* and was remanded to *London*; the archbiſhop of *Canterbury* was then chancellor, and adjudged it to be a good by-law.

Lib. Dunthorn' fol. 237. in *Guildhall,* a book which is a repertory of the records in *Guildhall.* There is the by-law for the brokers, and they pay 40*s.* annually at this day, and ever ſince they have been licenſed.

H. 14 & 15 *Car.* 2. *C. B.* Debt by the chamberlain againſt one *Hutchins* upon this by-law, and there were two juſtices againſt two, but afterwards a *Procedendo* was granted, and the lord chief juſtice took notice in that caſe of one *Barker*'s caſe, 8 *Car.* 1. *for licenſing porters.*

Object. 1 *Roll. Abr.* 364. *Pain* verſus *Haughton.*

Reſp. That caſe is not ſo ſtrong as this, becauſe it was in an action of treſpaſs, and ſo more ſtrict than upon a return, and there was a particular advantage to particular perſons.

Mich. 1656. *in C. B. Oſburn*'s caſe, after many arguments difference was agreed between by-laws made by virtue of a cuſtom, and where they are made by virtue of a charter; and here this by-law is founded upon cuſtom, and a *Procedendo* was there granted, and ſo is 2 *Cro.* 597. *Broad*'s caſe, cuſtom is ſtronger than a charter. *Moor* 403. A by-law to reſtrain the liberty of hawkers in *London* good for that reaſon.

An act of common council may be good in part, and void in part. *Adjournatur. Poſt.*

* Jeremy Guy *verſus* William Dormer. * P. 295.

Hill. 29 Car. 2. *Warr.*

TRESPASS and ejectment of a demiſe of *Robert Dormer* made 1 *Septemb.* 29 *Car.* 2. by indenture, of five meſſuages, 300 acres of land, 100 acres of meadow, and 400 acres of paſture with the appurtenances in *Granborough*, *Wooleſcot*, *Walcot* and *Willowby*, and of all tithes of grain and hay ariſing by the premiſſes from the laſt of *Auguſt* then laſt paſt ſeven years. Upon Not guilty pleaded, the jury find a ſpecial verdict, *viz.* Revocation.

That one *William Dormer* eſquire was ſeiſed of the lands and tenements in the declaration mentioned in his demeſne as of fee: And ſo being ſeiſed, the ſaid *William* 25 and 26 *Septemb.* 7 *Car.* 2. by his indentures of leaſe and releaſe conveyed the ſame to *William Moor* and *John Carter*, and their heirs, to the uſes in the ſame mentioned.

The tenor of which indenture of releaſe followeth in theſe words:

This indenture made the 26th day of *September* in the year of our Lord 1655. Between *William Dormer* of *Templeton* in the county of *Berks* eſquire of the one part, and *William*

William Moor of the *Middle-Temple London* Eſquire, and *John Carter*, ſecond ſon of *Ancel Carter*, citizen and grocer of *London*, of the other part. Whereas the ſaid *William Dormer* by his indenture bearing date the day before the date of theſe preſents made between the ſaid *William Dormer* of the one part, and the ſaid *William Moor* and *John Carter* of the other part, hath for the conſideration therein mentioned granted, bargained and ſold unto the ſaid *William Moor* and *John Carter* all thoſe ſeveral and incloſed arable meadow and paſture grounds, lying and being in the pariſh, lordſhip, hamlets or precincts of *Granburrough*, *Wooleſcot* and *Wakct* in the county of *Warwick*, and hereafter particularly mentioned, that is to ſay, All that ſeveral and incloſed paſture or paſture ground called or known by the name of *Braddimer's Cloſe*, abutting upon *Willoughby* field, and alſo all that ſeveral and incloſed paſture or paſture ground called or known by the name of *Turnchil*, which two cloſes are containing by eſtimation 165 acres, be they more or leſs,
* P. 296. * whereof forty of the ſaid acres are or were in the poſſeſſion of *John Frandon*, and alſo all that one other ſeveral and incloſed paſture or paſture ground wherein the ſhepherd's houſe now ſtandeth, adjoining to the ſaid ground called *Swinehill*, being divided with an hedge called *Courſe Hadens Hedge*, containing by eſtimation 128 acres, be it more or leſs; Alſo one other cloſe adjoining to the ſaid laſt mentioned paſture, and adjoining alſo to *Dunchurch* field, containing by eſtimation 26 acres and two rods, be it more or leſs; And alſo three other ſeveral and other incloſed cloſes or paſture grounds, lying betwixt *Onely* grounds, the *Grange* and *London* highway, containing by eſtimation 135 acres, be the ſame more or leſs; And alſo all hedges, ditches, fences, mounds, freeboards, ways, paſſages, privileges, profits, commodities, emoluments and hereditaments whatſoever to the ſaid ſeveral and incloſed arable meadow and paſture grounds, and to other the before mentioned premiſſes, or to any of them belonging, or in any wiſe appertaining, or to or with them, or any of them, with their and every of their appurtenances, and the reverſion and reverſions, remainder and remainders of all and ſingular the before mentioned bargained premiſſes, and of every part and parcel of them, and every of them, and all rents and ſervices reſerved upon any demiſe, leaſe or grant, demiſes, leaſes or grants heretofore made of the ſame bargained premiſſes, or of any of them, or of any part or parcel of them, or of any of them; And alſo all the eſtate, right, title, intereſt, claim and demand whatſoever of him the ſaid *William Dormer*, of,

in

in or to the before mentioned granted premiſſes, or of, in or to every or any part or parcel of them, or any of them; And all and all manner of profits and commodities whatſoever coming, growing, ariſing or renewing, or to be had in, of, upon or forth of the high meadow and *Aſhil* in *Wooleſcot*, *Walcot* and *Willowby* in the ſaid county of *Warwick*, *Mickmeadow* and the common greens and the lands leading to and from the ſaid greens in *Wooleſcot* and *Walcot* aforeſaid, and of, in, upon and forth of all and every the lands, tenements, meadows and hereditaments of him the ſaid *William Dormer*, lying and being in the common fields of *Willowby* aforeſaid, and of, in, upon or forth of all, every or any part or parcel thereof, the houſe or homeſtall now or lately in the occupation of *John Frandon* being in *Wooleſcot* aforeſaid only excepted and foreprized; To have and to hold the ſame unto the ſaid *William Moor* and *John Carter*, their executors or aſſigns, for the term of one year from the day before the ſaid * recited indenture next enſuing, and fully to be compleat and ended, as by the ſaid recited indenture it doth and may appear; by force whereof the ſaid *William Moor* and *John Carter* are actually poſſeſſed of the premiſſes. Now this indenture witneſſeth, That the ſaid *William Dormer*, for conveying and aſſuring the ſeveral paſture grounds and meadows, lands, tenements, hereditaments and premiſſes hereafter mentioned and declared, and for the good love and affection he hath and beareth to *Frances* his wife, and for her better maintenance and ſuſtentation, and for the natural love and affection, which he beareth unto *Robert Dormer*, nephew of the ſaid *William Dormer*, and for divers other good cauſes and conſiderations him the ſaid *William Dormer* in this behalf eſpecially moving, hath granted, releaſed and confirmed, And by theſe preſents doth grant, releaſe and confirm unto the ſaid *William Moor* and *John Carter*, their heirs and aſſigns, all and ſingular the ſaid ſeveral incloſed paſtures and paſture grounds, meadows, lands, tenements, hereditaments and premiſſes bargained and ſold, or mentioned, meant or intended to be bargained and ſold, in and by the ſaid recited indenture, and every part and parcel thereof, with their and every of their rights, members and appurtenances whatſoever, And the reverſion and reverſions, remainder and remainders together with the rents and profits of all and ſingular the recited premiſſes, and all the eſtate, right, title, intereſt, claim and demand whatſoever of him the ſaid *William Dormer* of, in or to the ſaid ſeveral and incloſed paſtures and paſture grounds, meadows, lands, tenements and premiſſes, and of, in and to every

* P. 297.

every part and parcel of the ſame, except before excepted; To have and to hold all and ſingular the ſaid ſeveral and incloſed paſtures and paſture grounds, lands, tenements, hereditaments and premiſſes, and every part and parcel of them, and every of them, with their and every of their rights, members and appurtenances, unto the ſaid *William Moor* and *John Carter*, their heirs and aſſigns for ever; Upon truſt and confidence nevertheleſs in them the ſaid *William Moor* and *John Carter*, their heirs and aſſigns repoſed, and to the uſes, intents and purpoſes hereafter in theſe preſents expreſſed, limited and declared, that is to ſay, To the intent and purpoſe, that they the ſaid *William Moor* and *John Carter*, and the ſurvivor of them, and the heirs of the ſurvivor of them ſhall permit and ſuffer the ſaid *William Dormer* for and during the term of his natural life, from time to time to receive and take all the rents, iſſues and profits of all the ſaid ſeveral incloſed paſtures, meadows, lands, tenements, * rents, hereditaments and premiſſes to the ſole and proper uſe of him the ſaid *William Dormer* and his aſſigns; And after the deceaſe of the ſaid *William Dormer*, then to permit and ſuffer the ſaid *Frances*, now wife of the ſaid *William Dormer*, and her heirs for and during the term of her natural life from time to time to receive, perceive and take all the rents, iſſues and profits of all the ſaid ſeveral and incloſed paſtures, meadows, lands, tenements, rents, hereditaments and premiſſes to the ſole and proper uſe and behoof of her the ſaid *Frances* and her aſſigns; Upon this farther truſt and confidence, that after the deceaſe of the ſaid *Frances* now wife of the ſaid *William Dormer*, they the ſaid *William Moor* and *John Carter* and their heirs, and the ſurvivor of them, and his heirs, ſhall ſtand ſeiſed of all and ſingular the ſaid ſeveral and incloſed paſture grounds, meadows, lands, tenements, hereditaments and premiſſes, To the uſe and behoof of the ſaid *Robert Dormer*, and of his heirs and aſſigns for ever, and to and for no other uſe, intent or purpoſe whatſoever. And laſtly it is covenanted and agreed, and it is the true intent and meaning of theſe preſents, that if the ſaid *William Dormer* ſhall at any time hereafter, by any writing ſubſcribed and ſealed by him in the preſence of two or more credible witneſſes, in expreſs words, ſignify and declare his intention to revoke or make void theſe preſents, or the eſtate and uſe herein or hereby limited and appointed unto the ſaid *William Moor* and *John Carter* and their heirs, of or in the premiſſes or any part thereof, that then and from thenceforth touching ſuch of the ſaid lands and premiſſes, whereof ſuch declarations ſhall

* P. 298.

be

be ſo made, the uſe and eſtate by theſe preſents limited and granted ſhall ceaſe, determine and be utterly void; any thing in theſe preſents contained to the contrary in any wiſe notwithſtanding.

In witneſs whereof, *&c.*

The jury farther find that it was indorſed upon the ſaid indenture thus:

Memorandum, That it is covenanted, concluded and agreed between all the parties to theſe preſents, before the enſealing hereof, that immediately after the deceaſes of the within named *William Dormer* and *Frances Dormer*, and before the limitations of the uſes therein limited, ſhall be any whit profitable or beneficial, that the within named *William Moor* and *John Carter* ſhall be farther truſted, that they and the ſurvivor of them, and the heir of the ſurvivor of them, ſhall permit and ſuffer *Jane Herbert*, now wife of *James Herbert*, niece to the within named *William Dormer*, to receive and take all the * iſſues and profits of the within granted premiſſes, for and during the term of five years from the deceaſes of the within named *William* and *Frances Dormer*, upon this confidence and truſt nevertheleſs, That the ſaid *Jane Herbert* ſhall detain and keep the ſaid iſſues and profits until *Jane Herbert*, god-daughter to the within named *William Dormer*, arrive to the age of fifteen years, and in caſe the ſaid god-daughter dies before the ſaid time, and the ſaid *Jane Herbert* the mother ſurvives, then the ſaid ſums of money ſo raiſed to be to her ſole profit, uſe and benefit; And with this farther truſt, that at the ſaid age of fifteen years of the ſaid god-daughter, ſhe ſhall deliver and be accountable for all the iſſues and profits to the ſaid *Jane*, the god-daughter, for her ſole benefit and uſe. * P. 299.

The jury farther find, That 9 *April* 20 *Car.* 2. the ſaid *William Dormer* made his laſt will and teſtament in writing ſigned and ſealed in the preſence of two credible witneſſes, by which he did give and deviſe as followeth:

I do give all my lands in *Wooſcot* alias *Walcot* or *Granborough* in the county of *Warwick*, with all their rents, rights and profits thereunto belonging, unto my nephew *William Dormer* and his heirs for ever, that is, in manner and form following, Provided always, and my will and meaning is, that my well beloved wife *Frances Dormer* ſhall firſt enjoy it immediately after my deceaſe for the full term of her natural life, and that immediately after the deceaſe of my ſaid wife, then my will and meaning is, that my god-daughter Mrs. *Jane Herbert* ſhall enjoy it with all the profits and commodities thereunto belonging, during the term of five

years, beginning from the day of my aforesaid wife's decease; and in case she die, then to *Dorothy Herbert*, sister, to the said *Jane Herbert*, shall enjoy the aforesaid five years of the aforesaid lands; and in case the said *Dorothy* die before she shall receive the aforesaid five years, then my will and meaning is, that my niece *Jane Herbert*, mother to the aforesaid *Jane* and *Dorothy*, shall enjoy all the rents and profits of the aforesaid lands in *Woofcot* alias *Walcot* or *Granborough* in the county of *Warwick*, for the term of five years, beginning from the day of my wife's decease, and after the expiration of the aforesaid five years, Then my will and meaning is, that my nephew, *William Dormer*, second son to my brother sir *Robert Dormer*, shall have the inheritance to himself and to his heirs for ever. *Item*, Whereas there is a suit at this time between my two nephews concerning 2000*l.* given by my brother sir *Robert Dormer*, to his young-
* P. 300. er son *William Dormer*, by virtue of a * codicil made by his father, and signed by himself in his life-time, which codicil one Mr. *Lane*, a lawyer of the *Inner Temple*, and myself perused, as being trusted by the said sir *Robert Dormer* for the aforesaid *William*, during his minority, by virtue of which codicil we found therein specified to be given to his son *William Dormer* 2000*l.* which sum, after the decease of my brother sir *Robert Dormer*, was by myself demanded of my nephew *Robert Dormer*, when he would pay it us in? Who answered, *That he hoped he might as well keep it as any other, paying use for it.* Upon which answer Mr. *Lane* and myself were content he should, and so it rested for that time, but myself going presently into *France* and leaving the whole business to Mr. *Lane*, who dying before I came back into *England*, and not having registered the aforesaid codicil, which as appeareth is now lost, only a copy thereof appears taken by a scrivener, which it seemeth is not sufficient for the recovering the aforesaid sum of 2000*l.* so that my nephew *William Dormer* is likely to lose his right; therefore in consideration of this I think myself bound in conscience to see him satisfied out of my own estate for our omission and great oversight of not having registered the said original. This I have written to shew how that I justify to the whole world in this my last will and testament, that there was such a codicil, wherein my brother sir *Robert Dormer* gave to his son, *William Dormer*, 2000*l.* and that his brother, *Robert Dormer* never denied payment thereof till now since his marriage, and my last coming out of *England*. *Item*, My will and meaning therefore is, that I do make my nephew *William Dormer* sole heir to my whole estate,

eſtate; provided he doth obſerve the conditions before mentioned in this my laſt will. In witneſs, &c.

That the ſaid *William Dormer*, the uncle, in *November* 20 *Car.* 2. died.

That the ſaid *Robert Dormer*, leſſor of the plaintiff, is nephew and heir of the ſaid *William* the uncle, and the ſame perſon named in the ſaid will.

That *William* the defendant is nephew of the ſaid *William* the uncle, and the ſame perſon named in his ſaid will.

That the term of five years expired in *May* 29 *Car.* 2.

That the ſaid *William Dormer* the defendant, afterwards entered into the ſaid tenement, and became ſeiſed, *prout Lex poſtulat.*

* That the ſaid *Robert Dormer*, 1 *Jun.* 29 *Car.* 2. entered, and 1 *Septemb.* 29 *Car.* 2. made the leaſe to the plaintiff *prout*, who became poſſeſſed until ejected. And the jury ſay, That the tenements in the declaration and the tenements in the indentures of 25 and 26 *Septemb.* 7 *Car.* 2. and alſo in the ſaid will dated 9 *April* 20 *Car.* 2. are the ſame. And that the ſaid *William Dormer*, now defendant, and *William Dormer* the nephew, named in the ſaid will, are the ſame. And the ſaid *William Dormer*, now defendant, nephew of the ſaid *William Dormer* the teſtator, did obſerve and fulfil all the agreements in the ſaid will mentioned, and that the ſaid *Frances Dormer* died in *Apr.* 22 *Car.* 2. And if upon the whole matter the deviſe be a revocation of the uſes in the indenture, they find for the defendant, otherwiſe for the plaintiff. * P. 301.

Weſt for the plaintiff. That the will is no revocation of the uſes, becauſe the words *(By expreſs words)* exclude all implicit revocations; for every revocation muſt purſue the power, for an eſtate at common law could not be undone without an entry, *Coke upon Litt.* 237. *a.* and 10 *Co.* 144. *Scroop*'s caſe, and *Hob.* 312. *Tibbot* verſus *Lee*, come not to this caſe, nor *Frampton*'s caſe *Moor* 736.

Serjeant *Croke* for the defendant. The interpretation of powers of revocation have been always favourable, becauſe eſtates of inheritance depend thereupon. Here the will is a revocation, becauſe when two acts cannot conſiſt, the later is a revocation of the former. In ſome things the donor or feoffor ſhall bind a power to circumſtances, as for a deed to be executed before three witneſſes, &c. But where there is only a general expreſſion, the later act ſhall ſatisfy thoſe general words.

As for authorities, 1 *Cr.* 472. *Jones* 392. *Snape* verſus *Turton*,

Turton, *Scroop*'s caſe, and *Frampton*'s caſe, and *Hob. Tibbet* verſus *Lee*, *Latch* 24. *Harding* verſus *Warner*. Power of revocation upon tender of rings, *ipſo declarante*, that he intended to make void the uſes. There were two againſt two. *Noy* 79. *Jones* 134. *Palmer* 429. 2 *Roll. Rep.* 393.

Judgment was afterwards given, that the power of revocation was well executed.

* P. 302. * Liſle *verſus* Grey. *Antea* 278.

Uſes.
Pollexf. 582.
2 Jon. 114.
2 Lev. 223.
2 Show. 6.
Poſtea 315.

SERJEANT *Mainard* for the plaintiff in the writ of error. The words, *And ſo ſeverally and reſpectively to every of the heirs male of the body of the ſaid* Edward Liſle, cannot be intended to the ſons as purchaſers, but the words ought to be conſtrued according to the rules of law.

Holt for the defendant much to the ſame purpoſe with ſir *Creſwel Levinz*.

North chief juſtice. Heir male is the deſcription of the perſon, and the word *So* is intended onwards, and not in like manner. *Adjournatur. Vide poſt.*

Ralph Dutton Eſquire, and Grizil his Wife, *Plaintiffs*; Nevil Pool Eſquire, *Defendant*.

In B. R. Hill. 28 & 29 Car. 2. Rot. 1123.

Aſſumpſit.
1 Danv. Ab. 64. p. 3.
1 Vent. 319, 332.
2 Lev. 210.
2 Jones 102.
3 Keb. 786, 814, 830, 836.

IN treſpaſs upon the caſe. The plaintiffs declare, That whereas ſir *Edward Pool* knight, father of the ſaid *Grizil* was poſſeſſed and lawfully intereſted of and in certain timber trees growing in a certain park called *Oakſey-Park* in *Wiltſhire*, 1 *May* 26 *Car.* 2. intended to cut down and ſell the ſame to raiſe portions for his children, of which ſaid intention the ſaid defendant having notice, he the ſaid defendant then at *Sherborn* in the county of *Glouceſter*, in conſideration that the ſaid ſir *Edward* at the defendant's ſpecial inſtance and requeſt would forbear cutting the ſaid trees, did promiſe the ſaid ſir *Edward*, that he the ſaid defendant would well and faithfully pay to the ſaid *Grizil* 1000*l.* And the plaintiffs in fact ſay, that the ſaid ſir *Edward* after the making the ſaid promiſe did not cut any of the ſaid trees, and yet the defendant did not pay the ſaid *Grizil* whilſt ſhe was ſole, nor the ſaid ſir *Ralph* and *Grizil*, or either of them after their marriage, the ſaid 1000*l.* though thereunto requeſted, *Ad damnum* 1000*l.* Upon *Non Aſſumpſit* pleaded, and verdict for the plaintiff, and damages 1000*l.* and judgment,

ment, the defendant brings a writ of error, and aſſigns the general error.

* *Holt* for the plaintiff in the writ of error. The promiſe is made to ſir *Edward Pool*, and the action is brought by *Grizil* and her huſband, to whom the payment was agreed to be made, which ought not to be. 3 *Cro.* 369. *Jordan* verſus *Jordan* 619 and 652. *Levet* verſus *Hawes*, 849 and 881. *Rippon* verſus *Norton*, *Roll. Abr.* 1. 31. *pl.* 6. and 30. *pl.* 3. *Archdale*'s caſe. A promiſe to pay money to the attorney of *A.* the action may be brought by *A.* or his attorney. *Latch.* 206. *Legat*'s caſe. * P. 303.

Pollexfen for the defendant in the writ of error. The action is maintainable by the party to whom the promiſe was made, or to the *Ceſtuy que Uſe*, the promiſe was indifferently, *Roll. Abr.* 1. 31. Z. *pl.* 8. *Oldham* verſus *Bateman*, 269. *Starkey* verſus *Mills*. and of this opinion were all the juſtices and barons; and judgment was affirmed. 2 *Co.* 47. *a. pl.* 175. *Sprat* verſus *Agar*, *M.* 1658. *B. R.*

Knight *verſus* Peachy and John Freeman.

ERROR to reverſe a judgment in *B. R.* in an action of covenant, wherein the plaintiff declares againſt the defendants as ſurviving executors of *Michael Knight* deceaſed; for that whereas one *Peter Wood* was ſeiſed of a toft, &c. in *London*, in fee, whereon a meſſuage ſtood, called the *Tallowchandler*, 4 *March* 22 *Car.* 2. demiſed by indenture the ſame to one *William Ginger*, from *Lady-day* then following, for 51 years, who entered and became poſſeſſed; That the ſaid *William Ginger*, 1 *Sept.* 22 *Car.* 2. built a new meſſuage upon the ſaid toft, and 8 *Sept.* 22 *Car.* 2. by indenture demiſed the ſaid meſſuage, &c. to *John Web*, from *Michaelmas* following, for twenty-one years, at 28*l.* rent ſterling; and the ſaid *John Web*, for himſelf, his executors, adminiſtrators and aſſigns did covenant to pay the rent, and to repair the premiſſes, and entered and became poſſeſſed; and 1 *December* 23 *Car.* 2. granted and aſſigned the ſaid premiſſes to the ſaid *Michael Knight*, and all his eſtate and term therein, who entered and became poſſeſſed; and 2 *Dec.* 24 *Car.* 2. made his will, and the defendants and one *Thomas Read* deceaſed, his executors, and died. That the defendants took upon them the execution of the ſaid will, and entered, and became poſſeſſed. That the ſaid *William Ginger* by indenture dated 20 *June* 25 *Car.* 2. granted all the premiſſes, * and all his eſtate * P. 304.

Covenant. 1 Vent. 329. 2 Jon. 109.

eſtate therein to the ſaid *William Peachy* the plaintiff, to which grant the defendants, &c. did attorn, by reaſon whereof the plaintiff became poſſeſſed of the reverſion of the ſaid meſſuage for the reſidue of the ſaid twenty-one years. That the ſaid *Thomas Read* died 1 *March* 1673. and 84*l.* for three years, ending at *Michaelmas* laſt, was behind, and ſome repairs wanting; and ſo the defendants have broken their covenant *ad damnum* 200*l.*

The defendants plead, that after the making the ſaid indenture of demiſe and grant, and aſſignment by the ſaid *John Web* to the ſaid *Michael Knight*, and after the ſaid grant and aſſignment to the plaintiff, and before any part of the rent of 48*l.* was behind, *viz.* 10 *October* 25 *Car.* 2. the defendants aſſigned the premiſſes to one *Evan Powel*, of which the plaintiff had notice. The plaintiff replies, That the ſaid aſſignment was made by fraud and covin between the ſaid defendants and the ſaid *Evan Powel*, to defraud the ſaid plaintiff of the rent aforeſaid. To which replication the defendants demurred, and judgment was given in *B. R.* for the plaintiff; and the defendants brought a writ of error, and aſſigned the general error. And ſerjeant *Weſton* for the plaintiff in the writ of error. That cannot be ſaid to be by fraud, which the law allows to be done; and here the aſſignees are not reſtrained from aſſigning, and therefore the aſſignment cannot be ſaid to be by fraud generally; but ſome particular fraud ought to have been alledged as perception of rents, continuance in poſſeſſion, &c. For in all caſes where the thing ſtands indifferent to be fraudulent or not, there fraud cannot be pleaded generally, but the ſame muſt be ſet forth in particular. *Plowd.* 46. *b.* *Mich.* 9 *H.* 6. 41. cited there.

Pollexfen and *Holt* for the defendant in the writ of error. If fraud cannot be generally aſſigned here, a landlord can never be ſure of his rent, for he cannot tell upon what terms his leſſee aſſigns the tenements.

In caſe of a recovery by default, fraud may be generally alledged, as in *Wimbiſh* and *Talbois*'s caſe, *Plowd.* 47. but if after a verdict, there it muſt be ſpecially alledged; and *Treſham*'s caſe, 9 *Co.* 110. *a.* the reſolution there is direct for this caſe, and afterwards the parties agreed.

Bambridge

* Bambridge *verſus* Bates, Cuſhee and Date. * P. 305.
Middleſex.

TRESPASS for breaking the plaintiff's houſe at the parish of St. *Mary Matfellon*, alias *White-chappel*, and taking away his goods, and names them, *ad damnum* 150*l.* The defendants plead Not guilty, and the jury find a ſpecial verdict, *viz.* Treſpaſs. Poſtea 328, 337.

That by an act of parliament 12 *Car.* 2 *cap.* 23. 'twas enacted, That from and after the 25th day of *December* 1660. there ſhall be throughout your majeſty's kingdoms of *England*, dominion of *Wales*, and town of *Berwick upon Tweed*, raiſed, levied, collected and paid unto your majeſty, during your life, for beer, ale, cider, and other liquors herein after mentioned, the ſeveral rates, impoſitions, duties and charges therein after expreſſed, and in manner and form in the ſaid act following, *viz.* That all common brewers of beer and ale ſhall once in every week, and all inn-keepers, alehouſe-keepers, victuallers, and other retailers of beer, ale, cider, perry, metheglin, ſtrong-water, brewing, making or retailing the ſame, ſhall once in every month make true and particular entries at the office of excise, within the limits of which the ſaid commodities and manufactures are made, of all beer, ale, perry, cider, metheglin, ſtrong-water, or other the liquors, aforeſaid, which they or any of them ſhall brew, make or retail in that week or month reſpectively, as aforeſaid; And that all ſuch common brewers who do not once a week make due and particular entries, ſhall forfeit 5*l.* and that every ſuch inn-keeper who doth not make true and particular entries once a month, 5*l.* And that every alehouſe-keeper, victualler, and other retailer, who doth not once a month make due and particular entries, ſhall forfeit 20*s.* And that every common brewer who ſhall not pay, and clear off within a week after he made his entry, or ought to have made his entry, as aforeſaid, ſhall pay double the value of the duty; And that every inn-keeper, alehouſe-keeper, victualler, or other retailer who ſhall not pay and clear off within a month after he made his entry, or ought to have made his entry, as aforeſaid, ſhall pay double the value of the duty; the ſaid reſpective forfeitures to be levied upon their goods and chattels in ſuch manner and form as hereafter in this act is * ordained and directed; And that all forfeitures and offen- * P. 306.

ces

ces made and committed againſt this act, or any clauſe or article therein contained, ſhall be heard, adjudged and determined by ſuch perſon and perſons, and in ſuch manner and form, as hereafter in and by this act is directed and appointed, that is to ſay, All ſuch forfeitures and offences made and committed within the immediate limits of the chief office in *London* ſhall be heard, adjudged and determined by the ſaid chief commiſſioners and governors of exciſe appointed by his majeſty, or the major part of them, or by the commiſſioners for appeals and regulating of this duty, or the major part of them in caſe of appeal, and not otherwiſe; And all ſuch forfeitures and offences made and committed within all or any of the counties, cities, towns or places within this kingdom, or dominion thereof, ſhall be heard and determined by any two or more of the juſtices of the peace reſiding near to the place where ſuch forfeitures ſhall be made, or offence committed; and in caſe of neglect or refuſal of ſuch juſtices of the peace by the ſpace of fourteen days next after complaint made and notice thereof given to the offender, then the ſub-commiſſioners, or the major part of them, appointed for any ſuch city, county, town or place, ſhall, and are hereby empowered to hear and determine the ſame; and if the party find himſelf aggrieved by the judgment given by the ſaid ſub-commiſſioners, he ſhall or may appeal to the juſtices of the peace at the next quarter-ſeſſions, who are hereby empowered and authorized to hear and determine the ſame, whoſe judgment therein ſhall be final, which ſaid commiſſioners for appeals, and regulating this duty, and the chief commiſſioners for exciſe and all juſtices of peace and ſub-commiſſioners aforeſaid, reſpectively, are hereby authorized and ſtrictly enjoined and required, upon any complaint or information exhibited and brought of any ſuch forfeiture made, or offence committed contrary to this act, to ſummon the party accuſed, and upon his appearance, or contempt, to proceed to the examination of the matter of fact, and upon due proof made thereof, either by the voluntary confeſſion of the party, or by the oath of one or more credible witneſſes (which oath they or any two or more of them have hereby power to adminiſter) to give judgment and ſentence according as in and by this act is before ordained and directed, and to award and iſſue out warrants under their hands for the levying of ſuch forfeitures, penalties and fines, as by this act are impoſed for any ſuch offence committed upon the goods and chattels of the * offender, and to cauſe ſale to be made of the ſaid goods and chattels, if they ſhall not be redeemed

* P. 307.

deemed within fourteen days, rendering to the party the overplus if any be, and for want of ſufficient diſtreſs to impriſon the party offending till ſatisfaction be made, and that all parts of the cities of *London* and *Weſtminſter*, with the borough of *Southwark*, and the ſeveral ſuburbs thereof, and pariſhes within the weekly bills of mortality, ſhall be under the immediate care, inſpection and management of the ſaid office, and that if any perſon or perſons ſhall at any time be ſued or proſecuted for any thing by him or them done or executed in purſuance of this act, he or they ſhall and may plead the general iſſue, and give this act in evidence for his defence, and if upon a trial the verdict ſhall paſs for the defendant or defendants, or the plaintiff or plaintiffs be nonſuited, then ſuch defendant or defendants ſhall have double coſts to him or them awarded againſt ſuch plaintiff or plaintiffs.

That this act was confirmed 13 *Car.* 2. *cap.* 7.

That 22 and 23 *Car.* 2. *cap.* 5. It was enacted as followeth, *viz.*

That from and after the 24th day of *June* 1671. there ſhall be throughout your majeſty's kingdom of *England*, dominion of *Wales*, and town of *Berwick* upon *Tweed*, raiſed, levied, collected and paid unto your majeſty, your heirs and ſucceſſors, during the ſpace and term of ſix years, from the 24th day of *June* aforeſaid, and no longer, for beer, ale, cider, and other liquors herein after expreſſed by way of exciſe, over and above all other duties, charges and impoſitions by any former act and acts, ſet and impoſed in manner and form following, That is to ſay, *inter alia*, For every gallon of low wines of the firſt extraction, made of any kind of imported wine or cider, or other materials imported, to be paid by the maker or ſeller. 2. And that every the common brewers and retailers of ale and beer, and all and every other perſon and perſons liable to and chargeable with the pain of any exciſe, or new impoſt upon beer, ale, or other exciſeable liquors, by virtue of any former law of exciſe now in force, ſhall alſo be liable to, and charged with the payment of the additional rates and duties hereby impoſed, which ſaid additional rates and duties ſhall be collected, levied and paid in the ſame manner; and the ſame perſons liable to, and chargeable with the pain thereof, ſhall, in caſe of neglect or default of entry or payment, or in caſe of any other neglect or offence * tending * P. 308.
to defraud his majeſty, or any of his officers, farmers or collectors of the duties or rates hereby impoſed, be alſo ſubject

ject to the like proceedings, judgments and executions, and ſhall likewiſe incur the ſame penalties, fines and forfeitures as he or they, his or their heirs and executors or adminiſtrators ſhould or might have been ſubject to, or ought to have incurred for the non-payment of any former duty of exciſe, or for the like offence committed againſt any former law of exciſe now in force; and that all forfeitures and offences made and committed againſt this act, or any clauſe, article or ſentence herein contained, and all appeals, ſhall be heard, adjudged and determined by ſuch perſon and perſons, and in ſuch manner and form, as the like forfeitures and offences againſt the former laws of exciſe are thereby appointed to be heard and determined, and not otherwiſe; And moreover, that all commiſſioners, ſub-commiſſioners of exciſe, all commiſſioners of appeals, juſtices of peace, conſtables, and other officers and miniſters whatſoever, ſhall have, uſe, and exerciſe the ſame juriſdiction, power and authority, whether it be judicial or miniſterial for the better ordering, collecting, levying and ſecuring the duties, and the additional rates and duties hereby impoſed, as he or they could have had, uſed or exerciſed for the better ordering, collecting, levying or ſecuring any former rates or duties of exciſe whatſoever; And that all fines, penalties and forfeitures, which ſhall be incurred by reaſon of any offence committed againſt this act, ſhall be employed, one moiety thereof to the uſe of the king's majeſty, his heirs and ſucceſſors, another moiety thereof to him or them that ſhall or will inform or ſue for the ſame; and alſo, that if any perſon or perſons ſhall at any time be ſued or proſecuted for any thing by him done in purſuance or execution of this act, he and they ſhall and may plead the general iſſue, and give this act in evidence for their defence; and if upon trial a verdict ſhall paſs for the defendant or defendants, or the plaintiff or plaintiffs be nonſuited, then every ſuch defendant or defendants ſhall recover his or their double coſts.

That by another act of parliament 29 *Car.* 2. It is enacted, That from and after the 24th Day of *June* 1677 there ſhall be throughout your majeſty's kingdoms of *England*, dominion of *Wales*, and town of *Berwick* upon *Tweed*, raiſed, levied, collected and paid unto your majeſty, your heirs and ſucceſſors, during the ſpace and term of three years, from the 24th Day of *June* aforeſaid, and no longer, for beer, ale, * cider and other liquors herein after expreſſed by way of exciſe, over and above all other duties, charges and

* P. 309.

and impoſitions by any former act or acts ſet or impoſed in manner and form following, *viz. (inter alia)* For every gallon of low wines of the firſt extraction, made of any kind of imported wine or cider, or other materials imported, to be paid by the maker or ſeller. 2. And that the ſeveral rates and duties of exciſe upon beer, ale and other liquors, ſhall be raiſed, levied, collected and paid unto your majeſty, your heirs and ſucceſſors, during the ſpace and term of three years, as aforeſaid, and no longer, in the ſame manner and form, and by ſuch rules, means and ways, and under ſuch penalties and forfeitures, as are contained, mentioned, expreſſed and directed in the before cited act of parliament of 22 and 23 *Car.* 2. That the plaintiff at the time of the treſpaſs, and for 3 years before was, and continued a common diſtiller of ſtrong-waters at *Wapping* in *Middleſex*, within the juriſdiction of the chief commiſſioners of exciſe, and during all the time aforeſaid, did exerciſe the art and myſtery of a diſtiller of ſtrong-waters, and did extract a certain low wine of the firſt extraction. That one *William Hall*, gent. within the time aforeſaid, *viz.* 2 *Nov.* 29. *Car.* 2. at the principal capital office of exciſe, in the pariſh of ſaint *Peter the Poor in London*, did exhibit before the chief commiſſioners and governors of the exciſe, an information as well for the king as for himſelf, that the plaintiff being a diſtiller and maker of ſtrong-waters, and of low wines within the juriſdiction of the ſaid office, between 23 *Auguſt* 29 *Car.* 2. and 24 *September* following, being one month, made 5880 gallons of low wines of the firſt extraction of cider, or other materials imported, and did not pay the exciſe due for the ſame, contrary to the form of the ſtatute in ſuch caſe made and provided. To which information the plaintiff appeared, and pleaded Not guilty. And ſo far it proceeded, that 13 *November* 29 *Car.* 2. the commiſſioners proceeded to the examination of the matter aforeſaid, and thereupon it did appear by the oath of credible witneſſes, that the plaintiff had within the time aforeſaid made 5880 gallons of low wines of the firſt extraction of materials imported, and had not paid the exciſe due for the ſame; and thereupon the ſaid commiſſioners did adjudge that the plaintiff ſhould forfeit 98*l.* being double the value of the ſaid low wines, to be levied of his goods and chattels.

* That 18 *December* 29 *Car.* 2. the ſaid commiſſioners, at * P. 310.
the proſecution of the ſaid *William Hall*, made their warrant to the defendants, being meſſengers belonging to the ſaid office, reciting the judgment aforeſaid, and by which the

the ſaid commiſſioners did authorize and require the defendants, in his majeſty's name, immediately to enter into the plaintiff's houſe and diſtillatory, and to levy, by way of diſtreſs, the ſaid ſum of 98*l.* of the goods and chattels of the plaintiff, and the ſame goods to be diſpoſed according to the ſaid act.

That the defendants purſuant to the ſaid warrant, 10 *Jan.* mentioned in the declaration, did enter into the plaintiff's houſe, and did take the goods in the declaration mentioned, for the ſaid 98*l.* and that the ſame are not ſufficient to anſwer the ſaid ſum of 98*l.*

That there are dregs of ſugar, called molaſſes, made beyond ſea, which are brought into *England.*

That there are molaſſes which are made in *England.*

That the low wines, in the information and judgment ſpecified, were extracted from the molaſſes, which were extracted and made in *England* from ſugar imported from beyond the ſeas, and divers other *Engliſh* materials.

That the ſugars, from which the molaſſes of which the ſaid low wines were extracted, were ten times of more value than the reſt of the materials which were uſed by ſeparation of the aforeſaid molaſſes from the ſugar aforeſaid.

That the molaſſes can never be made ſugar again.

That the plaintiff in making the ſaid low wines doth uſually add ſeven hogſheads of waſh, in which are put one quarter of malt, and twelve hogſheads of water to produce the extract of 200 gallons of low wines.

That the principal ſpirit of that extraction is produced from the molaſſes. But whether upon the whole matter the defendants be guilty or no, the jurors *ignorant, & petunt adviſamentum Curiæ.*

Williams for the plaintiff. The queſtion is, Whether molaſſes be an imported material within the ſtatute of 29 *Car.* 2.

1. This act is intituled a free gift of the commons in parliament, without any recompence moving from the crown, and therefore ought to be expounded beneficially for the people.

* P. 311. * 2. 'Tis a new charge and impoſition upon the ſubject, and odious to the people by way of exciſe.

3. 'Tis found that molaſſes made in *England* is uſed in making of low wines, and 'tis found that this low wine is made of theſe molaſſes.

The act diſtinguiſhes between low wines made of foreign molaſſes, and wine made of *Engliſh* materials.

No

No low wine is made of *Engliſh* material alone.

Materials here are intended immediate materials, *viz.* The molaſſes which are *Engliſh*.

Object. Materials ſhall be ſuch as comprehend the principal part in value.

Reſp. The bulky part is the materials, and not the value; and here the lump is the quarter of malt; as *Engliſh* cloths are ſo called if they be made of *Engliſh* cloth, though there be *French* lace upon them of double the value.

And the material cauſe is that which is immediate, as cloth is the material cauſe of a garment, not the wool.

And 'twill be a hard conſtruction to put upon the trade of diſtillers, who are numerous; and yet the whole rent reſerved upon the duty from them to the farmers is but 50*l.* *per Annum*, which would be 5000*l.* if they ſhould be ſaid imported materials, and 'twould not be worth their labour, if ſo, and multitudes would be undone.

Ward for the defendant. There are two queſtions.

1. If an action of treſpaſs will lie againſt the officers, becauſe they acted by authority from the commiſſioners of exciſe, who have juriſdiction of the cauſe, and ought not to be queſtioned here?

2. Whether the duty be due here to the king.

1. It doth not lie, 8 *Co.* Dr. *Bonham*'s caſe, 10 *Co.* the caſe of the *Marſhalſey*. And when a man acts as judge, he is not queſtionable. 1 *Cr.* 341. *Pidgeon*'s caſe. And the plaintiff ought to have brought his appeal, and not an action of treſpaſs.

Object. Mich. 19 *Car.* 2. *Terry* verſus *Huntington*.

Reſp. The queſtion there was, Whether the liquors were ſtrong-waters perfectly made? And the jury found againſt the fact, and ſo the commiſſioners had not juriſdiction.

To the 2*d.* Here is a duty due for theſe low wines.

1. They are made of materials imported, *viz.* Dregs of ſugar and lees of wine, which are not *Engliſh*, and though *Engliſh* materials are added, that alters not the caſe, becauſe 'tis found, that all the *Engliſh* ingredients together, without theſe materials, would not have made theſe low wines, & *ubi major pars ibi totum*. In the caſe of alnage, which is only for woollen cloth; yet reſolved that linſey woolſey pays alnage, though but part wool. * P. 312.

Upon the ſtatute of tillage, the major part gives the denomination, when prices of corn exceed ſuch a value; the common price regulates that ſtatute.

Croon's caſe, information upon the ſtatute of 22 *Car.* 2. the

the laſt clauſe thereof, which ſays, That all wines remaining in ſtore ſhall pay the duty. The defendant there imported wines in 1666. and ſo the wines were not remaining in ſtore, becauſe imported before the act; and yet reſolved that they ſhall pay; and ſo agreed in a writ of error by *Hales* and *Vaughan*. *St. Hill*'s caſe, importation of wheat meal was within the ſtatute of tillage.

As to the reſervation of the rent to be but 50*l*. 'tis not found in the verdict. *Adjournatur*. *Poſt*.

Memorandum, In *September* 1679. *Francis Barrel* ſerjeant at law, who had been a reader of the *Middle Temple*, died in *Kent*.

Memorandum, *October* 22. Sir *William Jones*, knight, attorney general, ſurrendered up his patent, and I took the acknowledgment thereof; and ſo the place of attorney general became void, by leave from his majeſty. And afterwards about *October* 25. ſir *Creſwel Levinz*, knight, was made attorney general.

By the ſtat. of 26 *H*. 8. *cap*. 3. The revenue of the firſt-fruits and tenths of the clergy was granted to the crown, and the ſeveral biſhops were thereby appointed collectors thereof in their reſpective dioceſes. The auditor was to make up their reſpective accounts, which were by him tranſmitted into the office of the pipe, according to the courſe of the exchequer, where the biſhop had his *Quietus eſt*, and where all accountants accountable in the exchequer
* P. 313. have their * *Quietus eſt* at this day. But the auditor was not thereby enjoined to give the biſhop a duplicate of his account; and it was needleſs then, becauſe he had his *Quietus eſt* from the pipe, without fee or other reward for the ſame.

By the ſtatute of 32 *H*. 8. *cap*. 45. That courſe was altered, and a court of firſt fruits and tenths was erected, conſiſting of a chancellor, treaſurer, attorney, and two auditors, who were to make up the accounts of that revenue, and being fairly ingroſſed, were to remain in the ſame court as the king's records, and not tranſmitted into the pipe: But no *Quietus eſt* or duplicate of his account was thereby enjoined to be made and given to the biſhops.

By the ſtatute of 7 *E*. 6. *cap*. 1. The auditors were enjoined to make forth and give duplicates of their accounts

at

at the reaſonable requeſt and coſt of the accountant, wherein the biſhops were included, and accordingly the practice has gone ever ſince the beginning of queen *Elizabeth*; and I never heard it was diſputed by any until the archbiſhop of *York*, when biſhop of *Carliſle*, was pleaſed to call his duplicate of his account, a *Quietus eſt*, and ſo would pay nothing for it.

Queen *Mary* by virtue of an act of parliament made in the ſecond ſeſſion in the firſt year of her reign, *cap.* 10. by her letters patent diſſolves the ſaid court of firſt-fruits, and then creates a new office and officer, *viz.* The remembrancer of the firſt-fruits and tenths, who was to take all compoſitions, and to enter all accounts, and to make out all proceſs againſt *Non-ſolvents*, and all proceedings therein, to be under the ſurvey of the court of exchequer.

In the ſecond and third year of *Philip* and *Mary*, the clergy were exonerated from payment of firſt-fruits and tenths.

In the firſt year of queen *Elizabeth*, *cap.* 4. The payment of firſt-fruits and tenths was reſtored to the crown, and all things concerning the ſame that remained untaken away the eighth of *Auguſt* in the ſecond and third year of the ſaid *Philip* and *Mary*, were then reſtored and ſettled under the ſurvey and government of the exchequer, but the court * of firſt-fruits was not revived, for that was diſſolved before the ſaid eighth of *Auguſt*, and the remembrancer being then eſtabliſhed, continues to this day in every degree, ſort or condition, as it was at or before the eighth of *Auguſt* in the ſaid ſecond and third year of *Philip* and *Mary*, at which time the clergy were exonerated from payment of firſt-fruits and tenths. * P. 314.

The archbiſhop requires auditor *Bridges* to examine, ſtate and paſs his accounts for the year 1675, 1676, and 1677, according to the method I conceive he has ſent up, which is not purſuant to the auditor's truſt, and would be prejudicial to the king to the loſs of all arrears owing by the incumbents; for in his ſtate no arrears of the clergy are continued in charge. Not underſtanding the true nature of thoſe accounts, in that they relate not barely and ſimply to the biſhops receipts and payments, but to the whole revenue of the reſpective dioceſes, each incumbent is thereby charged

charged and discharged. And if no arrears be continued in charge upon the incumbents, they all, or any of them may plead the account made out in the bishop's name (when entered upon record) for their discharge.

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* P. 315.

* Term. Mich. 31 Car. 2.

In the Exchequer Chamber.

John Lisle *versus* John Grey. *Error out of* B. R. *Ejectment. Northumberland.*

Uses. Pollexf. 582. 2 Jones 114. 2 Lev. 223. 2 Show. 6. Antea 278, 302.

THE plaintiff declares of the demise of *William Lisle* of four messuages, twenty acres of land, two hundred acres of meadow, two hundred acres of pasture, and three hundred acres of moor in *Acton*, in the parish of *Felton*. Upon Not guilty pleaded, the jury find a special verdict.

That one *John Lisle* was seised in fee of the tenements in question, and so seised 15 *August* 15 *Car.* 1. by indenture between himself of the one part, and *John Robson*, and others, of the other part, for settling the premisses in his blood; and in consideration of the natural love and affection to those to whom the estates afterwards are limited, and for the advancement of his son *Edward Lisle*, covenants to stand seised, to the use of himself for his life without impeachment of waste, the remainder to the use of the said *Edward Lisle* for his life, the remainder to the use of the first son of the said *Edward*, and the heirs male of his body, so to the second, third and fourth sons, and so severally and respectively to every of the heirs male of the body of the said *Edward Lisle*, lawfully to be begotten, and the heirs male of the body of such heirs male lawfully to be begotten, according to their ages and seniorities, and for default of

of ſuch iſſue, to the uſe of *William Liſle* of *Warkworth*, gent. for his life, and after his deceaſe, to the uſe of his firſt ſon in tail male, and ſo to his other ſons, the remainder to the right heirs of the covenantor.

Provided, That if it ſhall happen the ſaid *Edward Liſle* to die without iſſue male of his body lawfully begotten, then the ſaid covenantor and his heirs ſhall ſtand ſeiſed, to the uſe, intent and purpoſe that they ſhall raiſe out of the profits the ſeveral ſums of 100*l.* a-piece for each and every of the * daughters of the ſaid *Edward Liſle*, to be paid to * P. 316. the eldeſt firſt, and ſo in order according to their ſeveral ages; and the ſaid *John Liſle* had iſſue *Edward* his eldeſt ſon.

1 *Mar.* 17 *Car.* 1. *John Liſle* died ſo ſeiſed.

Edward had iſſue only a daughter ſtill alive.

30 *September* 1649. *Edward* made a feoffment to the uſe of *Thomas* and *John Forſter*, and their heirs, with warranty againſt all men.

Hill. 1649. a recovery was ſuffered wherein *Ralph Forſter* was demandant, the ſaid *Thomas* and *John Forſter* tenants, and the ſaid *Liſle* vouchee, and he vouched over the common vouchee.

1 *May* 1674 *Edward Liſle* died without any iſſue, but his daughter; That at his death all the eſtates limited by the indenture of 15 *Auguſt* 15 *Car.* 1. preceding the limitation to *William Liſle* named in the ſaid indenture, and now leſſor of the plaintiff, did end and determine.

The ſaid *William Liſle* was couſin of the whole blood of the ſaid *John Liſle*.

20 *January* 28 *Car.* 2. *William Liſle* entered upon the poſſeſſion of the defendants, and made the leaſe to the plaintiff, who entered and was poſſeſſed until the defendants ejected him. And if for the plaintiff, for the plaintiff, &c.

And judgment was given in *B. R.* for the plaintiff, and now the defendants bring a writ of error.

And I conceive judgment ought to be reverſed.

The ſingle queſtion in this caſe will be (for I do not think the proviſo which appoints the daughters portions will make any doubt, becauſe 'tis found in the verdict, That all eſtates precedent to *William Liſle*'s eſtate determined upon the death of *Edward*) What eſtate *Edward Liſle* had by virtue of the indenture of 15 *Auguſt* 15 *Car.* 1. for if he had but an eſtate for life, then the judgment ought to be affirmed; but if he had an eſtate-tail, then the judgment ought to be reverſed; and I hold that he had an eſtate-tail.

There are but three arguments that I can find, that can be urged why he ſhould have but an eſtate for life, *viz.*

1. The intent of the covenantor.

2. That the word *(heirs)* here muſt be taken for ſons or iſſues.

3. That heirs male here muſt take by way of a ſpringing uſe.

P. 317. * 1. *As to the firſt.* That it was the intent of the covenantor, that the heirs male of *Edward* ſhould take by purchaſe, ſeems apparent.

1. From theſe words, ſo, *viz.* as the four ſons, ſo every other heir male have it.

2. Severally and reſpectively as they become in being.

3. Why ſhould but four ſons be named, had not the covenantor intended that every other ſon ſhould take by the ſubſequent words?

4. It's provided, that *Edward* ſhall have power to make proviſion for the daughters, which needed not have been, if the covenantor intended an eſtate-tail.

5. To the heirs male of ſuch heirs male, had been needleſs.

6. To the heir male according to their ſeniority.

All which do ſhew that it was the intent of the covenantor to have *Edward* to be but tenant for life, and his ſons to take as purchaſers; notwithſtanding which intent, yet if ſuch intent cannot conſiſt with the rules of law, the limitation will be void, and therefore a grant of lands by deed executed by livery and ſeiſin to *A.* for ever is but an eſtate for life, though the feoffor intended otherwiſe. *Doct. & Stud. lib.* 1. *cap.* 24. *fol.* 39. *b.* So a gift by deed to a man and his heirs for twenty years ſhall go to the executors. *Lit. ſect.* 740. *Doct. & Stud. lib.* 2 *cap.* 20. *f.* 93. *b.* So a feoffment to *A.* upon condition, that if he pay not *B.* a certain ſum, *B.* ſhall enter, yet *B.* cannot enter.

Intent, inconſiſtent with the rules of law, not to be regarded, *Bridgman* 85. *Verba intentioni, non e contra, debent inſervire,* 8 Co. 94.

And this holds as well in caſe of a uſe, as at the common law; for before the ſtatute 27 *H.* 8. after uſes had gained the reputation of inheritances deſcendible, the common law directed the deſcent of them, and therefore there was *poſſeſſio fratris* of a uſe, as well as of land. 5 *E.* 4. 7. 4 *Co.* 22. *a.*

Uſe governed by the rules of law.

Uſes are now reduced to the rules of the common law. 1 *Co.* 87. *b. Corbet's* caſe, 6 *Co.* 34. *Fitzwilliams's* caſe.

3 *Cro.* 856. *Atwater* verſus *Bird.*

A feoffment to the uſe of *A.* and his iſſues male of his body makes not an eſtate-tail. *Roll. Abr. Tit. Eſtate* 837. *R. pl.* 1 and 2.

And therefore in our caſe it being expreſsly againſt the rule

rule of law, that where the anceſtor takes an eſtate for life, and afterwards the land is limited to him and the heirs of his body *(heirs)* ſhall be a word of limitation. 1 *Co.* 104. *a. Shellie*'s caſe. Theſe words ſhall not be conſtrued according to the intent of the party, but according to the rule of law, * and ſo *Edward* ſhall be in of an eſtate-tail executed by virtue of theſe words.

* P. 318.

2. *As to the ſecond argument.* Where this limitation is to the heirs male, that is, to his (iſſues) male, and ſo as much as (ſons.)

Heir not taken for iſſue.

True it is, in the ſcripture phraſe 'tis ſometimes ſo taken, as, *This is the heir, let us kill him*; and St. *Paul, The heir whilſt he is a child is under tutors and governors, and differeth not from a ſervant.*

Huſband, ſo called after divorce, to deſcribe the perſon, 8 *Co.* 73. a.

But in our law 'tis never taken ſo, no not in a will.

In *Foſter* and *Ramſey*'s caſe, *Mich.* 1657. *B. R.* The caſe was to this purpoſe, thus: Sir *Robert Ramſey* had iſſue four ſons, *Robert*, *Nicholas*, *John* and *George*; *Robert* being an alien had only daughters; *Nicholas* had iſſue *Patrick*; *John* by his will gives his land to the heir of his brother *Nicholas* in fee, *Nicholas* being then alive. Reſolved, *Patrick* the ſon did not take; and yet in common parlance the eldeſt ſon is called heir. 2. It might amount to a deſcription of the perſon, and to enure as an executory deviſe, *viz.* To the heir of my brother *Nicholas*. 1. To the perſon who ſhall be heir at the death of my brother *Nicholas*; and yet reſolved *ut ſupra:* For the proper uſe of the word *heir*, is to make an inheritance. 1 *Co.* 103. *b. Shelly*'s caſe. And ſhould the word *heir* be otherwiſe taken, and only as a deſcription of the perſon, it would make ſtrange alteration, eſpecially in wills.

9 *Co.* 127. b. *Sunday*'s caſe.

Now if this word cannot be taken for ſon or iſſue in a will, much leſs in a deed, which is contrived by learned advice.

The third and laſt argument is, That this eſtate may enure to the heirs male by way of ſpringing uſe; as thus, To the heirs male of *Edward*, that is, To ſuch others as ſhall be his heirs male of his body, when they ſhall have a capacity ſo to take; and in the mean time the uſe to ſleep in the covenantor; and ſo was *Pibus* and *Mitford*'s caſe in *B. R.* 25 *Car.* 2. *B. R.* where the caſe was thus. Upon a ſpecial verdict in ejectment, *Michael Mitford* was ſeiſed in fee, and had iſſue two ſons, *viz. Robert* by his firſt wife, and *Ralph* by his ſecond wife, whoſe name was *Jane*, and

Springing Uſes.

ſo being ſeiſed by indenture covenants to ſtand ſeiſed, after the date of the ſaid indenture, *To the uſe of the heirs male of his body begotten on the body of his ſaid wife* Jane, *with a* * P. 319. * *remainder to his own right heirs.* And the queſtion was, Whether any eſtate did accrue to the ſon by the ſecond wife? And adjudged that there did by way of a ſpringing uſe.

But I think there is good reaſon for that caſe, and yet not for the caſe in queſtion. For in that caſe, 'tis true the covenantor had all the eſtate in him at and after the time of the covenant, but it cannot be ſaid that he had an eſtate for life, or any other particular eſtate, and ſo 'tis not within the rule of *Shellie*'s caſe. But in our caſe *Edward Liſle* was ſeiſed for life (and ſo the verdict expreſly finds it) and ſo within the rule of *Shellie*'s caſe directly.

And if this conſtruction ſhould be made, I cannot ſee in what caſe the rule in *Shellie*'s caſe will hold; for all may be interpreted as ſpringing uſes, and to lie *in gremio Legis* till there be a ſon. And I take the rule in *Shellie*'s caſe to be a poſitive law, of which there can no reaſon be given, but is a land-mark by which other caſes are bounded; and ſuch are many rules in our law, as why a fine ſhould not be reverſed for non-age of the conuſor but by inſpection during the non-age; and yet in a common recovery 'tis otherwiſe; ſo life and death are to be tried by jury, yet the life of the huſband in a writ of dower, is to be tried by witneſſes.

But upon the whole matter, I take this caſe to be the ſame with *Lewis Bowles*'s caſe, and that here *Edward* had an eſtate-tail; and ſo judgment ought to be reverſed.

Murray *verſus* Eyton. *Antea* 260, 286.

Eſtate.
2 *Jon.* 237.
Pollexf. 491.
Skin. 95.
2 *Show.* 104.
Poſtea 338.

SAUNDERS for the plaintiff. The ſole queſtion depends upon the fine and conveyance levied and made by *Charles* earl of *Derby*; and in this caſe there are two points.

1. Whether the private act of parliament of 4 *Jac.* hath altered the eſtate-tail granted by the letters patent of 2 *R.* 3. and hath made it another eſtate, or hath altered it in ſome accidents.

2. Admitting that the eſtate be altered, Whether this new eſtate be reſtrained from alienation, by 32 *H.* 8. *cap.* 36.

It appears upon the verdict, that earl *Charles* received 1700*l.* for the ſale of the land. But the land is of the value of 2000*l. per Annum*, and the purchaſers have reimburſed themſelves at leaſt 40000*l.*

Before

* Before I ſhall ſpeak to the firſt point, I premiſe, 1. That the reverſion of the crown continues as it was at the time of the making of the letters patent. 2. If this act of 4 *Jac.* had not been made, the firſt eſtate-tail could not have been barred. 3. If the eſtate-tail is not barred, then neither the ſeoffment nor fine have made any diſcontinuance. *Co. Lit.* 355. *a.* * P. 320.

And that the act of 4 *Jac.* hath not altered the firſt eſtate-tail, I ſhall prove, by anſwering ſome objections already made, and then produce reaſons.

1. *Object.* The firſt eſtate had no power to make jointures to the wives of them, or the wives of their eldeſt eſtates, which this eſtate hath.

Reſp. It doth appear, that 'twas the intent that only a third part ſhould be ſo diſpoſed, which was no more than they ſhould have for dower; and ſome of the lands are reſtrained from that privilege.

2. *Object.* By the letters patent every of the grantees was tenant in tail, and might commit waſte; but ſo cannot tenant for life by this act.

Reſp. The omiſſion of that privilege doth not alter the eſtate; for if the king gives land upon condition, that the grantee ſhall not commit waſte, and afterwards an act of parliament is made which releaſes that condition, that doth not alter the eſtate. So *e contra*, If an act of parliament ſhall take away the privilege of committing waſte, it doth not alter the eſtate.

3. *Object.* By the letters patent the lands are to be holden by ſervice of chivalry, and now here will be no tenure.

Reſp. The tenure doth not alter the eſtate, becauſe 'tis but a collateral accident.

4. *Object.* By the letters patent there was an intire eſtate given; but here are ſeveral eſtates, for life, and eſtates-tail, which are not intire.

Reſp. Theſe eſtates are all the ſame in quantity, which they would have been without the act, and it's the ſame eſtate as to duration; for whatſoever eſtates are here made, ariſe out of the eſtate tail, and the reverſion is not touched, and that was the intent of the act, as appears by the ſaving; for the enacting part is, That the ſeveral perſons ſhall have the ſeveral eſtates under the ſavings following. And this private act hath cut that, which was but one intire eſtate, into ſeveral pieces; and *Co. Lit.* 372. *b.* The third obſervation there is, * That if the king keeps the reverſion, none of the meſne eſtates can be barred; and ſo in *Staſford*'s caſe. * P. 321.

Object.

Object. If the heir ſhall bring a *Formedon*, he muſt count upon this act of 4 *Jac.* and therefore the eſtate ariſes by that act, which is the donor.

Reſp. The heir need not here bring a *Formedon*, but may enter; but if he will admit himſelf out of poſſeſſion, he ſhall not count upon the act only, but upon the letters patent and the act alſo; for ſuppoſe the firſt intail be ſpent, the king muſt count upon the letters patent in a *Formedon* in *Reverter*. This act is not the donor, but the crown; for the parliament cannot give, but by virtue of the legiſlative power eſtates may be ſettled or changed, as in this caſe.

There are ſome things to be obſerved, by which the intent of the act appears, that the eſtate-tail ſhould not be altered, wherein there are remainders to ſeveral perſons, in order, That (whereas before there was ſome diſpute who were firſt to take) all perſons might be ſatisfied with the order in this act preſcribed concerning the ſame.

1. In the ſaving, there is livery and primer ſeiſin reſerved to the crown, as if the act had not been made, which could not be if the eſtates were new.

2. Power to make jointures for life, had an eye to the firſt eſtate-tail, for there is a power to bind the iſſue, but not the remainders; and ſo of leaſes; but the king ſhould not be bound.

The intent of the parliament was to make a ſettlement in the family, and not to give the parties power to alien, for they intended by the ſaving to preſerve the lands from alienation, as if the act had never been made.

As to the ſecond point. That this eſtate is preſerved by the ſtatute of 32 *H.* 8. *cap.* 36. By the ſtatute of 4 *H.* 7. *cap.* 24. and before 32 *H.* 8. *cap.* 36, a fine did not bar an ordinary eſtate-tail. True it is, that *Co. Lit.* 372. is contrary, and that it did bar; but it is but his opinion, and he cites no authority for it, and there are other authorities againſt his opinion. The ſtatute of 32 *H.* 8. ſays, That there was diverſity of interpretation and expounding of that ſtatute, whether ſuch fine ſhould bar the iſſues in tail; and ſo it appears by the book of 19 *H.* 8. 6. which ſays, That the words of the act of 4 *H.* 7. are ſatisfied by barring the iſſues of tenant in fee-ſimple; and the iſſues in tail, though
* P. 322. in ſome meaſure privies, * yet they claim paramount the fine. And general words in an act of parliament do not comprehend an eſtate-tail, as in the caſe of *Premunire*. *Co. Lit.* 130. *a.* 11 *Co.* 63. Dr. *Foſter's* caſe.

Between

Between 4 *H.* 7. and 26 *H.* 8. were between forty and fifty years, and yet all that time no eſtate-tail was forfeited for treaſon. Now what reaſon had the judges to conſtrue the general words of 4 *H.* 7. that a fine ſhall bind as well privies as ſtrangers, that the iſſues ſhall be bound by a voluntary act of the tenant in tail, and yet that he ſhall not forfeit his eſtate for treaſon, which is the higheſt offence? The words of *Weſtm.* 2, are, That he ſhall not have *poteſtatem alienandi*, and that *finis ipſo jure ſit nullus.* That a fine was no bar to the iſſues in tail between 4 *H.* 7. and 32 *H.* 8. and *Br. Aſſurances* 6. 19 *H.* 8. 6. Amongſt the judges who were of another opinion was *Brook* himſelf, which ſhews that either the reporter was miſtaken, or my lord *Brook* had retracted his opinion, which was ten years after the writing his abridgment, and 1 *Anderſon* 46. *pl.* 118.

Obſervations out of the ſtatute of 32 *H.* 8. itſelf.

1. There was diverſity of opinions in this point.

2. The words are, *Be it enacted (not declared)* ſo it is a conſtitutive, not a declarative act, it is *Introductivum novi Juris, non declarativum veteris*, that fines ſhall bar an eſtate-tail.

3. That the fines heretofore levied ſhall be a bar to the eſtate-tail, which ſhews that the ſtatute of 4 *H.* 7. was too feeble to do it.

4. The third proviſo, That the act ſhall not extend to ſuch fines as were then in ſuit, by which it appears that there were recoveries of lands in tail of which fines had been levied.

5. The words of the ſtatute are, That this act ſhall not extend to fines of lands, whereof the reverſion is in the king, but that every ſuch fine ſhall be of like force as it was or ſhould be, if the act had not been made. Obſerve the ſtatute of 34 *H.* 8. recites, that there was a great miſchief by this doubt for a recovery, but not by a fine, which ſhews that fines were not uſed in ſuch caſes.

Serjeant *Maynard* for the defendant. The eſtate-tail is not extinguiſhed, but altered. The points are,

1. Whether here is any eſtate within 34 *H.* 8.

2. Before 34 *H.* 8. a recovery did bar the iſſue in tail, in caſe of an adverſary writ; but the queſtion was of writs by conſent. *Vide* 10 *Co.* 43. *b.* That a common recovery barred in all caſes.

* By this act of 4 *Jac.* the firſt eſtate-tail is clearly barred, and conſequently the clog upon it that it could not be barred, is gone; and earl *Charles* or his ſon ſhall not claim * P. 323.

under

under the old intail; so that the question now will be, Whether the estates created by 4 *Jac.* shall be within the statute of 34 *H.* 8. And I hold that they are not, because those estates do not issue out of the reversion belonging to the crown, but only out of the old intail. When a third estate is to be raised out of the other two, it shall be said to come out of each of them, according to their respective capacities to grant or pass the same. *Treport*'s case. If the king and the earl of *Derby* had joined in a fine to raise an estate-tail, the earl had been the donor. An act of parliament adds strength to an estate, but is directed by the law. 8 *Co. Barrington*'s case.

Object. It is an estate created by parliament, and that is the donor.

Resp. William tenant in tail is the donor. 2 *Co.* 15. and 16.

The reason why a common recovery did bar the issue, was not because it was a common assurance; but because at the common law every recovery was a bar. And though the statute of *Westm.* 2. *cap.* 1. is, that tenant in tail shall not alien *neq*; *per factum nec feoffamentum*, and a recovery is not named; yet in the same parliament *cap.* 4. If tenant in tail lose by default, he shall have a *Quod ei deforceat*, which shews that a recovery did bind before that statute; and at this day a common recovery bars a tenant in fee-simple. though there be no tenant of the freehold, and so was 12 *E.* 4. *Taltarum*'s case. And when a recovery is had, it doth not appear to the court but that it was grounded upon good right; and it is incident to an estate-tail to be barred by common recovery. *Portington*'s case.

To the second point, Whether a fine would bar the issue before the statute of 32 *H.* 8. There is no resolution in the case of 19 *H.* 8. 6. but *Dyer* 32. seems to make it a bar, and had not the law been so, the statute of 32 *H.* 8. would not have respected fines that had been past, for it would have been unjust to alter estates past, contrary to what the law was taken to be at the time of the passing them.

Object. Notley's case cited in *Stafford*'s case, 8 *Co.* 78. *a.*

Resp. There is no such case to be found; but there is a case, 3 *Cro.* 595, and 612. *Stratfield* versus *Dover*; where disseisor of tenant in tail, the reversion being in the crown, levied a fine and barred the issue; but it is said there, * that the case went off upon point of pleading, (but seems contrary, 1 *Cro.* 430. by *Jones* justice): But the lord *Hob.* 332 and 333. taking notice of *Notley*'s case says, That to comprehend

* P. 324.

prehend fines within 34 *H.* 8. by the words, *any other Thing*, was an oblique and indirect ſtrain, and therefore all is granted upon *Cro.* 395. *Adjournatur.*

Player *verſus* Vere. *Antea* 288.

SIR *Robert Sawyer contra. Object.* This by-law reſtrains trade. By Law. 1 Danv. Abr. 734. p. 5. 1 Sid. 284. 1 Vent. 21. 2 Keb. 27, 490, 501.

Reſp. All cuſtoms and by-laws do reſtrain trade one way or other, as 5 *Co.* the chamberlain of *London*'s caſe, and 8 *Co. Waggoner*'s caſe; but this is not a trade, but an employment; as porters and coal-meters, *&c.* which are within the diſpoſition of the city.

Object. This power is to be exerciſed by deputy.

Reſp. The exerciſe of power in all great bodies ought to be delegated; and it is impoſſible otherwiſe to have it executed.

Object. Taylors of *Ipſwich*'s caſe, and 1 *Roll. Abr.* 364. *Moor* 576.

Reſp. Thoſe were orders to reſtrain trade by virtue of letters patent; but here is general cuſtom to make by-laws.

The caſe of *Pain* and *Houghton* was upon this particular cuſtom.

As to the penalty, it is common to every by-law; for what may be prohibited, may be prohibited upon a penalty. 1 *Roll. Abr.* 365. *pl.* 9. *Edwards*'s caſe.

But if the by-law be naught for the fine, it may be good as to the other part of it. In every diſpoſal of the places of corn-porters and coal-meters, a reaſonable fine is reſerved.

Conſider the employment and the perſons, and it will be thought reaſonable that a ſtrictneſs ſhould be uſed more than ordinary.

Object. The defendant is not within the cuſtom, becauſe he is alledged to be a citizen. 1 *Bulſt.* 11. *Green*'s caſe.

Reſp. There was a private company of *Butchers*, and not like this caſe, which is of all the city, where by-laws will bind ſtrangers, as the cuſtom of foreign bought and foreign ſold; ſale of an horſe by an inn-keeper for his meat, *&c.*

* *Object.* 23 and 24 *Car.* 2. In this court, *Player* verſus *Dean*; and in 24 *Car.* 2. *R. Player* verſus *Bradnex*. * P. 325.

Reſp. The objection was made in *Dean*'s caſe by *Hale* chief juſtice, That that by-law was not for hire; and ſo it went off; and 22 *Car.* 2. in *C. B. Player* verſus *Hutchins*. The court was divided.

But

But admit that there is no ſuch cuſtom, or that it be doubtful, yet it is more agreeable to juſtice to grant a *Procedendo*, becauſe otherwiſe there would be a failure of juſtice, becauſe there is no other remedy to reſtrain theſe cars, which will, when without number, annoy the ſtreets; and if a *Procedendo* be granted, then upon the trial, the cuſtom may be controverted, and found ſpecially.

Here *Player* cannot proceed in this court, becauſe the action here muſt be brought in the name of the mayor, commonalty and citizens; but this by-law orders the action to be brought in the mayor's court by the chamberlain, and for this cauſe a *Procedendo* was granted in *Wilford*'s caſe, *Moor* 403. *pl.* 538. ſo for calling a woman *whore*. 2 *Roll. Abr.* 69. 1 *Cro.* 486. *Adjournatur ad proximam Cur.*

Afterwards it was argued for the defendant, That this caſe differs from all caſes of by-laws made by other corporations, in this, That we ſhall preſume *primo intuitu*, that this by-law is good, until it ſhall be found upon examination defective, becauſe it is not a by-law made by a private company for managing their particular affairs. Nor 2*dly*, by a corpotation made up and conſiſting of a ſmall number of men. Nor 3*dly*, by men obſcurely educated and ſkilful only in trade and not in laws.

But a by-law made by the body of the great and moſt famous city of *London*; a city known, where *England* is not; a city which is well ſkilled not only in trade of all ſorts, but in learning likewiſe.

And by-laws of this nature made by the whole city, are made not only by the lord mayor and aldermen, but alſo by the common council repreſenting all other the citizens, attended and aſſiſted with the recorder, counſel at law, and very many others learned and well read, not only in the laws of this kingdom, but in all other human learning.

So that he that will ſuddenly cenſure ſuch a by-law without well weighing it, and ſtrictly comparing it with the rules, whereby all by-laws are to be examined, will undertake a great taſk, and with much difficulty (if at all) obtain a juſtification from knowing men.

* P. 326. * And as ſir *Francis Moor* ſays in his argument of *Davenant* and *Hardie*'s caſe 583. *All by-laws are accommodated to the utility and advantage of the place.* And ſo a by-law made in *Newcaſtle* may be good for that place, which may not ſerve for *London* or *Norwich.*

So I make no queſtion but that this by-law hath been found in the main of it, ſo far as to order the carts and carmen, a moſt advantageous law for the city: for, conſidering

the

he humour of ſuch men, the populouſneſs of the place, he quality of perſons there inhabiting, and thither reſorting, and the occaſions of ſtopping the ſtreets and lanes, which though much amended of late, yet narrow enough or the paſſengers, ſome ſuch law is very fit to prevail in this city.

And the rather for that this is not a trade, but an employment; and therefore where it is objected, that the city may as well reſtrain brewers, taverns, tallow-chandlers, &c.

I anſwer, There is not the ſame reaſon, for they are trades to which men are bound apprentices, and to take away their trade is to take away their livelihood.

Nor 2*dly*, That the overſight is committed to another corporation, for I cannot ſee, why it may not be as well managed by them, nay better than by others,

Object. What if the preſident will not grant a licence?

Reſp. 'Tis not to be preſumed when we conſider what great truſt he is in already, that he ſhould falſify it in ſo ſmall a matter. 2*dly*, The ſame objection may be made to the clerk of the inrolments in *Chancery*, or any officer of any court of juſtice. And if an action of the caſe will not lie here, yet an equivalent remedy may be had, for upon an addreſs to the mayor and aldermen there will be proviſion in ſuch caſe. So that ſo far I ſhall not doubt of the validity of this by-law.

That which ſticks with me is, That part of it from whence ariſes this very controverſy, which is, *That* 17s. 4d. per annum, *and no more, ſhall be received and paid for a carroom, and* 20s. *and no more, or greater fine, upon any admittance or alienation of a carroom, which* 17s. 4d. per annum, *and* 20s. *aforeſaid, is wholly to be applied towards the relief and maintenance of the poor orphans harboured and to be harboured in* Chriſt's hoſpital; *and if he ſhall work without licence he ſhall forfeit* 13s. 4d.

In all privileges either by preſcription or patent to make by-laws, there is this clauſe either expreſſed or implied, that they be *ad utilitatem Regis & Populi, bonæ fidei congrua, & rationi conſona, & dummodo non ſint in præjudicium populi,* as * we may ſee in *Waggoner*'s caſe, 8 *Co.* 121. *b.* and *Davenant* and *Hardie*'s caſe, *Moor* 576. and many others. * P. 327.

Now it is ſaid to be *ad utilitatem* of the people when there is *Quid pro Quo.*

8 *Co.* 125. Sir *George Farmer* preſcribes to have a common bakehouſe in *Toceſter*, and that all the inhabitants ſhould bake there: but then he lays in his preſcription, that

that

that bakehouſe was ſufficient to bake all the bread for t inhabitants and paſſengers. So 11 *H.* 4. 86. *b.*

Mich. 1657. in *B. R. Intr. Hill.* 1656. *Rot.* 1335. A verſus *Jackſon.* An action upon the caſe for not grinding his mill, where he preſcribes for mulcture, as ſir *Geor Farmer* did for his bakehouſe; and reſolved, he muſt av that his mill was ſufficient to grind all the corn, and that h was bound ſo to do; and a caſe was there cited to be a judged *Paſch.* 43 *Eliz.* in *B. R. Gooby* verſus *Knight*, Th caſe of the town-chandler of *Canterbury*.

Mich. 5 *Jac.* in *B. R. Pincocke* verſus *Sanders.* Up evidence, a cuſtom that the corporation of *Gravesend* hav uſed to maintain a barge for tranſporting paſſengers fro thence to *London*, and that till that barge be full, none ca carry paſſengers without licence. *Roll. Abr.* 561. *pl.* 2. *Brownl.* 177. And this is the reaſon of murage, pontage toll travers and other tolls.

There are mutual advantages, and the duty is but equi valent to the profit. And ſo was *Blackwell-Hall*'s caſe, *Co.* 62 *b.* the penny for hallage was to pay for the labour o the ſearcher.

And the monies due upon meaſuring of cloth ſo far as t anſwer the charge and the profit of the people was agree to be good, 11 *H.* 4. 86. *b.* though no judgment was there in given.

Now examine whether this be ſo or no.

1. Here is no compulſion for the carmen; ſo that my goods may be burnt, and I cannot force a carman to carry them away.

2. Here is 17*s. per annum* and 20*s.* fine; for what? for the uſe of the poor of *Chriſt's-hoſpital.*

This hath no reſpect to the overſeeing of the carts, the ſtreetmen and others are to be provided for otherwiſe, and ſo not like the caſe of *Blackwell-Hall.* So that I take this to be a pure impoſition without regard to the thing in queſtion. And there might have been as well 17*l. per annum*, and 20*l.* fine as this that is impoſed; though perhaps the circumſtances of perſons be more conſidered in this. But that will not alter the caſe.

* P. 328. * And I do not find any by-law of this nature in any place. The caſe of *Andrew Deveen* of reſtriction of brokers hath been cited, but that was to reſtrain the office, but not to reſerve a rent or fine. And though it be ſaid that 40*s. per annum* is now paid, it may not be by that by-law.

I find this caſe (as hath been cited) 1 *Roll. Abr.* 364. *Payn* verſus *Haughton*, there adjudged a monopoly; and yet there

ıere no rent or fine reſerved. As to the caſe in *C. B. Hutchin*'s caſe, the court was divided.

And afterwards *Termino Hillar.* 31 & 32 *Car.* 2. adjudged y the whole court, *nemine contradicente*, That the by-law 'as not good by reaſon of the fine and rent, but in all ıings elſe very good; and ſo a *Procedendo* was denied. *'id.* 2 *Roll. Rep.* 413. *Kete* verſus *Michel.*

Bambridge *verſus* Bates and others. *Antea* 305.

WALLOP for the plaintiff. This molaſſes is neither within the words of the act. 2. Nor can it conſiſt ith the grounds of philoſophy. 3. Nor grounds of law. Treſpaſs. Poſtea 337.

As to the firſt. If the molaſſes is not at all imported, he neceſſary conſequence will be, that it is not a material nported; but if it was at all imported, it muſt be either hen the ſugar was imported, or before, or ſince; but it ould not be when the ſugar was imported, being not in *ſſe*, but was made of ſugar here in *England*, and therefore could not be made a material here imported.

Suppoſe there ſhould be a prohibition that no molaſſes hould be imported, and a man imports ſugar of which molaſſes is afterwards made, this ſhould not be within the prohibition.

As to the 2d, Molaſſes differs eſſentially from ſugar; or what does not partake of the ſame ſpecifick form differs eſſentially, but molaſſes doth not partake of the ſame ſpecifick form with ſugar; *Ergo*, *&c.*

Now there is in this making of molaſſes a ſeparation of parts, and conſequently a new ſpecifick form, as cheeſe, butter, *&c.* are produced by ſeparation of parts, and do ſpecifically differ from milk.

When it appears farther by the verdict, that the Engliſh materials are contributory to this prohibition, and it cannot be ſaid, that molaſſes is the *Fæces* of ſugar, ſince *Fæces* are only of liquid things, neither can they be compared to the lees of wine; for ſugar after twenty years ſtanding would never produce lees. And the verdict does not find that it is made of ſugar, but a ſeparation and extraction from it. For the ſweetneſs may ariſe from the Engliſh materials. And ſuppoſe corn ſhould be brought from beyond ſea, the liquor ariſing therefrom by extraction would not be an imported material. So roſe-water from roſes imported. * P. 329.

As

As to the third, From the grounds of law, mola[sses] not be said to be a material imported. 1. Not ac[cording] the rule of law, *Forma dat esse*, and *mutata for[ma] substantia.*

Just. Inst. l. 2. Tit. 1. § *Cum ex aliena.* Minsing. 118.

The ancient Roman lawyers before *Justinian*, [in a] question of property, had two several sects, [viz.] *Sabinus*, and the other of *Proculus*; but afterwards, [it] agreed amongst the civilians, *That in all cases [where] form may be reduced to the former state, the prop[erty] to him who hath the old substance, but otherwise* not. here molasses cannot be reduced to sugar again. And this agrees *Hill.* 16 *H.* 7. 16. *pl.* 6. *Moor* 19. Leather cut into shoes may be retaken, but not [wool] into cloth, or milk made into cheese, *Res corrupta [non] formatæ abesse videntur.* A thing arising from the [parts] not any of the parts. Here all the materials are [of] reign and imported.

As to the value, it is not material, but the qu[antity] to the abstraction. Here is no proportion of [the] found in the verdict in making the low wines.

2. It is not within the act of parliament. There [is] such maxim, as *Not to recede from the letter of the [act] consisting with the law.*

The acts of excise discourage foreign trade, and [en]rage home made manufactures.

2. The acts charge only foreign commodities, or [those] made beyond sea. The book of rates says, that [malt] is a home manufacture.

These acts are penal, and therefore ought to be [taken] the plain and not strained sense; and therefore 39 *Eliz.* 15. which takes away clergy from one who takes [goods] *&c.* out of an house in the day-time, extends not to [ne]cessary. 1 *Cr.* 473. *Evans* and *Finch*'s case. So the [act] of 1 *Jac.* against *Stabbing* doth not extend to a [stab] upon a previous restraint of the offender by the party [killed]

* P. 330. *Buckner*'s case, * *Mich.* 1655. *B. R.* So the statute of *Eliz. cap.* 20. doth not extend to a covenant to enjoy.

Where a statute mentions particular matters, and [after]wards concludes in general words, the general words [are] be referred to things of the same nature, as the archbishop of *Canterbury*'s case, 2 *Co. Other Means.* So the statute of burglary: So here, *Other Materials* shall be intended [mate]rials of the same nature. These general words have a [good] effect, for new foreign molasses are included. But if molasses should be included, why not low wines made of grapes or apples imported? *Generalis Clausula non porrigi*

ad ea quæ generaliter ſunt comprehenſa, Bonham's caſe. Wine or cider made here of grapes or apples imported are not within this law, *Qui nimis emungit, elicit ſanguinem.* And ſo I conclude for the plaintiff.

Sawyer contra. This act is not penal, but only to enlarge the king's revenue, and ſo ought to be expounded liberally.

The verdict finds that molaſſes is *Fæces* of ſugar, and lees of wine cannot be made wine again, ſo wine made vinegar; but he ſaid little more to the purpoſe. *Et adjournatur. Vide poſt.*

John James *verſus* William Richardſon. *Midd.*

EJECTMENT in a writ of error. The plaintiff declares of the demiſe of *George Durdant* 10 *Octob.* 28 *Car.* 2. at *Stanes*, of 20 acres of land, 20 acres of meadow and 20 acres of paſture in *Stanes* for five years from *Michaelmas* before. Upon Not guilty pleaded, the jury find a ſpecial verdict, *viz.*

Deviſe. 2 Danv. Ab. 515. p. 7. Eq. Ab. 214. p. 11. 1 Vent. 334. 2 Vent. 311. 2 Lev. 232. 2 Jones 99. Pollexf. 457. Carth. 154. Skin. 205. 3 Keb. 832. Comb. 153.

Henry Wicks eſquire in his life-time 6 *Junii* 1657. was ſeiſed in his demeſne as of fee of the premiſſes in the declaration; and ſo being ſeiſed the ſame day and year made his laſt will and teſtament in writing, and thereby did deviſe to one *John Higden* and *Joan* his wife, being niece of the ſaid *Henry*, and to the heirs of the body of the ſaid *John* upon the body of the ſaid *Joan* begotten and to be begotten, all his meſſuages, ſtables, coach-houſes, lands, tenements and hereditaments in *Covent-Garden* and *Vinegar-Yard* in the pariſh of St. *Martin in the Fields*, and St. *Paul Covent-Garden* in the county of *Middleſex*. And farther the ſaid *Henry Wicks* by the ſame will deviſed the ſaid premiſſes in the declaration as follows, viz. *Item*, I * give and bequeath unto my couſin *John Higden* and his heirs, during the life only of *Robert Durdant*, my kinſman, eldeſt ſon of my nephew *Andrew Durdant* deceaſed, all thoſe my meſſuages, lands, tenements and hereditaments in *Stanes* and *Stanwel* in the county of *Middleſex*, upon this truſt and confidence, that he the ſaid *John Higden* and his heirs ſhall permit and ſuffer him the ſaid *Robert Durdant* from time to time, during the time of his life, to have, receive and take the rents and profits thereof, which ſhall yearly grow due and payable for the ſaid laſt mentioned premiſſes, He the ſaid *Robert* committing no waſte upon the ſame, and ſo as he the ſaid *Robert Durdant* after my deceaſe, and within one month after requeſt to be made to him, ſhall make and

* P. 331.

exeçute

execute to the ſaid *John Higden* and his wife, and the heirs between them, as aforeſaid, ſuch good and ſufficient releaſe, conveyance and aſſurance in law of the ſaid meſſuages, lands and premiſſes by me to them deviſed, as aforeſaid, in St. *Martins in the Fields*, and St. *Paul Covent-Garden*, as to them or any of them, their or any of their counſel learned in the law ſhall be reaſonably deviſed or adviſed and required, to the end that he the ſaid *John Higden* and his wife, and their children, may enjoy the ſame free from the claim of the ſaid *Robert Durdant*; and from and after the deceaſe of the ſaid *Robert Durdant*, Then I do give and deviſe the ſaid laſt mentioned lands and premiſſes in *Stanes* and *Stanwel* unto the heirs males of the body of him the ſaid *Robert Durdant*, now living, and to ſuch other heirs male or female, as he ſhall hereafter happen to have of his body. And for want of ſuch heirs, then to the uſe and behoof of my couſin *Gideon Durdant*, and the heirs of his body; and for want of ſuch heirs, the ſame to be and remain to the right heirs of me the ſaid *Henry Wicks*.

The ſaid *Henry Wicks* died ſeiſed; *George Durdant* leſſor of the plaintiff, at the time of the making of the ſaid will, and at the death of the ſaid *Henry Wicks* was the only ſon and heir male apparent of the ſaid *Robert Durdant* of the body of the ſaid *Robert Durdant* begotten. And the ſaid *Robert* never had any ſon beſides the ſaid *George*. And that the ſaid *George* was the godſon and nephew of the ſaid *Henry Wicks* the deviſor.

After the death of the ſaid *Henry Wicks*, the deviſor, the ſaid *John Higden* by virtue of the ſaid deviſe entered into the ſaid premiſſes contained in the ſaid declaration, and became ſeiſed thereof in his demeſne as of freehold, for the
* P. 332. * life of the ſaid *Robert Durdant*. He ſo being thereof ſeiſed 26 *Martii* 14 *Car.* 2. in conſideration of 365*l.* paid to him and the ſaid *Robert Durdant* by one *Abraham Spore*, he did infeoff the ſaid *Abraham Spore* and his heirs, to the uſe of the ſaid *Abraham* and his heirs, and in *Eaſter Term* 14 *Car.* 2. levied a fine without proclamations with warranty againſt him and his heirs; and *Robert Durdant* joined in the ſaid fine with like warranty. That the ſaid fine was to the uſe of the ſaid *Abraham Spore* and his heirs, by virtue of which ſaid feoffment and fine the ſaid *Abraham Spore* became ſeiſed in his demeſne as of fee, *prout lex poſtulat*; and being ſo ſeiſed 9 *Julii* 14 *Car.* 2. by his indenture then dated and made between him of the one part, and the ſaid *William Richardſon* of the other part, The ſaid *Abraham Spore* for 5*s.* demiſed the premiſſes for ſix months to the ſaid

ſaid *William Richardſon*, and by an indenture dated the day following, releaſed to him the ſaid *William Richardſon* and his heirs to the uſe of him and his heirs for a competent ſum of money. By virtue whereof the ſaid *William Richardſon* became ſeiſed in fee, *prout lex poſtulat.* 1 *Maii* 20 *Car.* 2. *Robert Durdant* died, and that at the time of his death the ſaid *George Durdant* was under age, *viz.* but 15 years old. That 1 *Octob.* 28 *Car.* 2. *George Durdant*, leſſor of the plaintiff, entered upon the poſſeſſion of the ſaid *William Richardſon*, and made the leaſe to the plaintiff. Judgment in *B. R.* was given by three againſt one.

And if for the plaintiff, for the plaintiff, *&c.*

Judgment was given in *B. R.* for the plaintiff, and now the defendant brings a writ of error.

Saunders for the plaintiff in the writ of error. The caſe upon the record, as to our purpoſe, is no more but this: *Henry Wicks* being ſeiſed in fee deviſes to *John Higden* and his heirs, during the life of *Robert Durdant*, the remainder to the heirs male of *Robert Durdant* now living. And the queſtion is, Whether *George Durdant*, the only ſon of the ſaid *Robert*, ſhall take in remainder during the life of his father? And I hold that this remainder is a contingent remainder, and not veſted during the life of his father. The words *(Now living)* would have a deſcription of the perſon, as the ſtatute of 25 *E.* 3. cap. 2. *Of Treaſon*, To kill the king, queen, or their eldeſt ſon and heir.

Reſp. It is not treaſon to conſpire the death of their heir, but eldeſt ſon.

Object. Quare Filium & Hæredem rapuit.

Reſp. If the writ were now to be framed, it would be otherwiſe; but there is a deſcription of the perſon, but no perſon is deſcribed only by the name of heir, but ſome addition is made to it, for *Non eſt hæres viventis.* * P. 333.

Object. Heirs male now living.

Reſp. Now living ſhall not be referred to heirs male, becauſe there can be no ſuch perſon during the life of *Robert*, but *Now living* ſhall be referred to *Robert* as *Proximus antecedens.* Poph. 21.

But admit that heirs male now living ſhould be a deſcription of the perſon, yet here is no ſuch perſon capable to take in the life of the father. If this were a remainder veſted, it ſhould be either by legal conſtruction, or becauſe wills are favoured in law.

Object. The words here ſhew the intent of the teſtator.

Reſp. This conſtruction cannot conſiſt with the intention of the teſtator, for he did not intend that *George* ſhould

have an eſtate during the life of his father, or for life only. And the word *heir* may be intended the deſcription of a perſon, but not when it is in the plural number. And if *George* ſhall take here by remainder veſted, he ſhall take only for life, which was never intended. On the other ſide, the whole will is ſenſibly penned; for there is a deviſe to *Higden* during the life of *Robert Durdant*, remainder to the heirs of him, which ſhews his intent, that his heirs ſhall take as purchaſers. And this conſtruction agrees with *Littleton*, *ſect.* 30. where an eſtate is limited to the heirs of the body of the father, it is an eſtate-tail, and the word *heirs* makes an inheritance, *Co. Lit.* 9. but *heir* makes but an eſtate for life. 1 *Co.* 63. *Archer*'s caſe, 1 *Roll. Abr.* 832. Deviſe to a feme and her heir, 2 *Cr.* 313. *Moor* 593. *Clark* verſus *Day*, 2 *Roll. Abr.* 253. *Pauſe* verſus *Lowdal.*

Object. What eſtate ſhall the heirs of *Robert* have?

Reſp. Heir in the ſingular number doth not make an inheritance, and here is no limitation to the females.

George cannot take as heir in the life of his father, for what if his father were attainted of felony or treaſon, *George* could never take.

* P. 334. The reaſon of the reverſal, was for that the eſtate limited to *Robert Durdant* was an eſtate for life in the lands executed by the ſtatute of 27 H. 8. Of Uſes, and then he being tenant in tail, his fine barred the eſtate-tail.

Now living ſhall be conſtrued to ſuch as ſhall be heir to *Robert Durdant*, and now living, *Vide Archer*'s caſe, and *Hob.* 29. *Counden* verſus *Clark*, and 2 *Leon.* 70. *Challoner* verſus *Bowyer.*

* And to conſtrue this will otherwiſe is to remove an ancient land-mark of the law, which is, that when the anceſtor takes an eſtate for life, the word *heirs* is a word of limitation, but otherwiſe, it is a word of purchaſe. Adjourned, and *Hill.* 31 & 32 *Car.* 2. Judgment was reverſed, *nemine contradicente præter* Atkins *Juſtice del Comman Bank.*

The Commiſſioners of Delegates at *Serjeants-Inn. Decemb.* 9. 1679.

Will.

GEORGE STONYWEL 2 *Septemb.* 1679. makes his will in writing and makes *Elizabeth*, his wife, his executrix, and gives all the *reſiduum* of his eſtate, after ſome legacies paid, to her; *Elizabeth* dies in his life-time, viz. 5 *Septemb.* 1679. and *George* the teſtator, having notice of the death of his wife, makes a nuncupative codicil dated 6 *Septemb.* 1679. and gives to *George Robinſon* all which he had given to his wife, and dies 13 *Septemb.* 1679. and the ſingle queſtion was, Whether this nuncupative codicil be allowable

allowable notwithſtanding the ſtatute of *Frauds* and *Perjuries*, 29 *Car.* 2. The words whereof are, *That no will in writing concerning any goods or chattels or perſonal eſtate ſhall be repealed, nor ſhall any clauſe, deviſe or bequeſt therein be altered or changed by any words, or will by word of mouth only, except the ſame be in life of the teſtator committed to writing, and after the writing thereof read unto the teſtator, and allowed by him, and proved to be ſo done by three witneſſes at the leaſt.* And reſolved by ſir *Hugh Wyndham* juſtice, myſelf and ſeveral civilians joined with us in the commiſſion, That as this caſe is, the nuncupative codicil is good; for by the death of *Elizabeth* before the teſtator, the deviſe of *Reſiduum* became totally void, and ſo there was no will, *quoad hoc* as to that part. And ſo the nuncupative codicil was *quaſi* a new will for ſo much, and was no alteration of the will as to ſo much, becauſe there was no ſuch will, its operation being determined.

And whereas it was objected, that by the ſame reaſon, if any part of a will in writing ſhall be made by force or fraud, the thing ſo given and ſpecified in ſuch part may be deviſed by a nuncupative codicil, and ſo the will altered contrary to the words of the ſtatute. We anſwered, that if ſuch part of a will were ſo obtained, it was no part of the will, and ſo * ſuch codicil would be no alteration of what was not; but would be an original will for ſo much. So if *A.* be poſſeſſed of an eſtate of 1000*l.* and by will in writing gives 500*l.* of it to *B.* he may give the reſidue by a nuncupative will, ſo as he do not alter the executor. * P. 335.

Pawlet's *Caſe.*

AMOS PAWLET 2 *Feb.* 1649. makes his will in writing, and gives a legacy to his niece, in theſe words: *I do ordain and give to my dear niece* Florence Roll *ſecond daughter of my brother* Denis Roll *eſquire, the ſum of* 500*l. which my ſiſter, the lady* Cholmeley *hath now in her hands of mine, as by her bond made to me and my heirs appears:* and makes no executor, and dies in *Octob.* 1669. About ten years before his death the lady *Cholmeley* paid to him the 500*l.* and whether this legacy is due is the queſtion; and we reſolved, that the legacy was due, though the ſecurity was altered; becauſe it is a pure legacy, neither *Legatum Nominis* nor *Legatum Debiti*; and the words are only to ſhew that he meant the legacy ſhould be as certain to her as he could make it. And the counſel for the Deviſe. 2 Danv. Ab. 328. p. 9.

legatee cited *Digeſt. de legatis quidam Teſtament.* 96. and alſo *Theobal* and *Wynn*'s caſe lately adjudged, where a deviſe was of a legacy out of debts due in ſeveral counties, and they were called in before the teſtator's death, and yet the legacy remained good. And *Hill.* 1671. *Scacc.* verſus *Chichely*, where the lady *Verney* gave legacies out of monies then out at intereſt, and called in before the teſtator's death. And a difference was taken between a legacy *in numerat.* and a ſpecifick legacy; for in the firſt caſe the legacy will remain, though the debt *ex quo* be paid in; but the ſpecifick legacy may be loſt by being altered. *Vide Godb.* 91. *Johnſon*'s caſe.

Evidence.

Nota; At a commiſſion of review in the caſe between *Bray* and *Whitelage* concerning the will of Mr. *George Bray* of *Lincoln's Inn*, who gave thereby all his eſtate to a woman he kept, and made her his ſole executrix, and waived his only brother, Mr. *Lodowick Bray*: It was ſaid by juſtice *Ellys*, that it was reſolved by the whole court of *B. R.* in the caſe of *Dutton* upon a trial at bar concerning his
* P. 336. will forged by Mr. *Colt*, * That depoſitions taken in *Chancery in perpetuam rei memoriam* upon a bill for that purpoſe exhibited, cannot be given in evidence at a trial at law, unleſs there be an anſwer put in and produced; and ſo he ſaid, he hath known it ſeveral times reſolved both in *B. R.* and *C. B.*

Ekins *verſus* Smith. *In the Exchequer.*

Trover.

ADJUDGED by the whole court, That if goods be condemned by the court, and proclaimed as forfeited, the property is altered, ſo as no action of treſpaſs or trover will lie by the proprietor againſt the perſon that ſeizeth them.

Term.

In the Exchequer.

Bambridge *verſus* Bates & al. *Antea* 305, 328.

LETCHMERE for the plaintiff. Here is not any ſpecial concluſion by the jury, *viz.* Whether the low wines are made of foreign materials? But as this record is, 1. Here is no colour for the court to give judgment for the defendant. 2. Here is colour to give judgment for the plaintiff. 1. For that they find that the jury find that the plaintiff was *communis Diſtillator aquarum fortium* for a year before; but they do not find that he made low wines of foreign materials, and ſo that which they find is a thing immaterial. 2. They find that *Hall* did exhibit an information, and the plea and judgment, *prout per Recordum apparet*, but do not find that the contents of that information were true. 3. They find that there is molaſſes made beyond ſea, and alſo in *England*; but they do not find who made them. 4. They find that molaſſes is made *ex fæcibus Saccari*, but they do not find that the plaintiff made the low wines *ex fæcibus Saccari*. Treſpaſs.

And for this very cauſe in *Terry* and *Huntington*'s caſe it was adjudged naught, in *Hill.* 1668. in this court. Vide Palmer 192. Langley *verſus* Payn.

In the caſe of bankrupts, although the commiſſioners have ſole authority to adjudge a man bankrupt, yet in an action the jury muſt find whether he was a bankrupt or no, and not barely by the adjucation of the commiſſioners.

'Tis ſo in caſe of a plea, 2 *Roll. Rep.* 40. In an avowry for an amerciament in a leet, it is not ſufficient to ſay *præſentatum fuit* at the leet, that the plaintiff did ſuch an act, but he muſt aver the thing, and not rely upon the preſentment.

2. Here is ground to give judgment for the plaintiff, becauſe it is expreſsly found that the defendant took away his goods.

* The firſt act which gave liberty to a defendant to plead the general iſſue was 7 *Jac. c.* 5. for by the common law every * P. 338.

every man was bound to plead duly, and not to juſtify by virtue thereof after he had pleaded not guilty; but that is, that he may give ſuch ſpecial matter in evidence, as being pleaded, had been a good and ſufficient matter in law to have diſcharged the defendant of the treſpaſs or other matter laid to his charge, and ſo he would have given every thing in evidence.

And the ſtatute of 23 *H.* 8. *cap.* 5. concerning ſewers, ſays, That in an avowry the avowant may juſtify the taking, *&c.* by virtue of the commiſſion of ſewers, without alledging the matter ſpecially.

But in this caſe at bar, upon the general iſſue pleaded, the ſpecial matter cannot be given in evidence; for though by the act of 12 *Car.* 2. that act may be given in evidence, and ſo 22 *Car.* 2. yet it is not ſaid ſo in the act of 29 *Car.* 2.

Memorandum, The 7th day of *February* I was made judge of the Common Bench 1679. 32 *Car.* 2.

Memorandum, The 29th day of *April* I was made judge of the King's Bench 1680. 32 *Car.* 2.

Robert Murrey *Gent.* Plaintiff, *verſus* Dorothy Eyton *Widow*, and Roger Price, *Defendants.*

In Treſpaſs and Ejectment. Intr. Hill. 29 & 30 Car. 2. *In Officio Placitorum.*

Eſtate. 2 Jones 237. Pollexf. 491. Skin. 95. 2 Show. 164. Antea 260, 286, 319.

THE plaintiff declares of the demiſe of *William-George-Richard* earl of *Derby* made 2 *May* 29 *Car.* 2. of one meſſuage, three water-griſt mills, ten acres of land, ten acres of meadow, and fifteen acres of paſture in the pariſh of *Hope* alias *Queenhope* for five years, from the firſt day of the ſaid month of *May*. Upon Not guilty pleaded, the jury find a ſpecial verdict, *viz.*

That long before the treſpaſs and ejectment, king *Richard* the third was ſeiſed of the manor of *Hope* in his demeſne as of fee in right of his crown, of which the tenements are parcel.

* P. 339. * That the ſaid king being ſo ſeiſed 17 *September* 2 *R.* 3. by his letters patent under his great ſeal of *England*, granted the ſaid manor and tenements *(inter alia)* to ſir *Thomas Stanley* knight, lord *Stanley*, and afterwards earl of *Derby*, and ſir *George Stanley* knight, lord *Leſtrange* ſon and heir apparent of the ſaid *Thomas* lord *Stanley*, and the heirs male

male of the body of the ſaid *Thomas* lord *Stanley* for ever, by knights ſervice, and 50*l. per annum.*

The words of which letters patent begin thus:

Cum non ſolum generis Nobilitas, ſed & juſtitiæ æquitas omnes provocent, & maxime Reges & Principes, homines de ſe bene meritos præmiis condignis afficere, Sciatis igitur, quòd ob ſingulare & fidele ſervitium quod dilecti noſtri Thomas Stanley Miles Dominus Stanley & Georgius Stanley Miles Dominus Leſtrange filius dicti Thomæ nobis præantea impender' non ſolum favendo Juri & titulo noſtro, cujus Juris & tituli vigore jam nuper ad Coronam hujus Regni noſtri Angliæ Domino adjuvante pervenimus, verumetiam reprimendo proditiones & militias Rebell. & proditorum noſtrorum qui infra idem Regnum noſtrum perfidam jamdudum commotionem ſuſcitaverant ac pro bono & fideli ſervitio nobis & hæredibus noſtris Regibus Angliæ per eoſdem Thomam & Georgium & hæred. ſuos pro defenſione noſtra & Regni noſtri præd. contra quoſcunq; proditores inimicos & rebelles quoties futuris temporibus opus erit impendend. De gratia noſtra ſpeciali dedimus & conceſſimus, &c. Letters Patent.

That by virtue thereof the ſaid *Thomas* and *George* did enter, and were thereof ſeiſed to them and the heirs male of the body of *Thomas*.

That *George* had iſſue *Thomas*, afterwards earl of *Derby*, and died in the life of the ſaid earl his father.

1 *June* 19 *H.* 7. *Thomas* the father died ſeiſed, by reaſon whereof *Thomas* the grandſon became ſeiſed in tail.

The ſaid *Thomas* had iſſue *Edward*, afterwards earl of *Derby*.

1 *Auguſt* 13 *H.* 8. *Thomas* laſt mentioned died ſeiſed, and *Edward* became ſeiſed; *Edward* had iſſue *Henry*, afterwards earl of *Derby*.

24 *October* 14 *Eliz. Edward* died ſeiſed, and *Henry* became ſeiſed.

* *Henry* had iſſue *Ferdinando*, afterwards earl of *Derby*, and *William Stanley* his ſecond ſon afterwards likewiſe earl of *Derby*. * P. 340.

25 *September* 35 *Eliz. Henry* died ſeiſed.

Ferdinando entered, and had no iſſue male but only three daughters, *viz. Anne*, *Frances* and *Elizabeth*.

16 *April* 37 *Eliz. Ferdinando* died ſeiſed in the life of his brother *William*, and ſo the premiſſes deſcended to him, who entered.

That

That after the death of *Ferdinando*, an act of parliament 4 *Jac.* was made for determining differences as followeth, *viz.*

In moſt humble manner beſeeching your royal majeſty, your highneſs loyal, faithful and obedient ſubjects, *William* earl of *Derby* of the moſt noble order of the garter, knight, *Henry* earl of *Huntingdon*, and the counteſs *Elizabeth* his wife, *Gray Bridges*, lord *Chandos*, and the lady *Anne* his wife, eldeſt daughter of *Ferdinando* late earl of *Derby*, ſir *John Egerton* knight, ſon and heir male apparent of the right honourable *Thomas* lord *Elleſmere*, lord chancellor of *England*, and the lady *Frances* his wife, which ſaid *William* earl of *Derby* is brother and heir male, and the ſaid ladies *Anne*, *Frances* and *Elizabeth* are daughters and co-heirs of the ſaid *Ferdinando* late earl of *Derby*, who died without iſſue male of his body.

That whereas after the death of the ſaid earl *Ferdinand* divers variances, ſuits and controverſies did ariſe and grow between your ſaid ſubjects *William* earl of *Derby*, and the ſaid ladies, as well touching the eſtate, right and title of, in and to the honours, caſtles, manors, lands, tenements and hereditaments of the ſaid earl, as alſo touching the filial portions and advancements of and for your ſaid ſubjects, the ſaid ladies *Anne*, *Frances* and *Elizabeth*; for appeaſing, ending and determining of which ſaid variances, ſuits and controverſies, the ſaid *William* earl of *Derby*, and other iſſues males of the ſaid honourable houſe of *Derby*, as alſo the ſaid ladies, before any their inter-marriages, by and with the advice and conſent of the right honourable *Alice* counteſs dowager of *Derby*, late wife of the ſaid *Ferdinand*, and mother of the ſaid ladies, and by and with the advice of other their honourable friends, and of their counſel learned, and officers, did ſubmit themſelves to the arbitrement, order and judgment of the right honourable *Thomas* lord *Buckhurſt*, lord high treaſurer of *England*, and now earl of *Dorſet*, * P. 341. * and of the right honourable *Guibert* earl of *Shrewſbury*, the right honourable *George* earl of *Cumberland* deceaſed, *George* lord *Hunſdon* deceaſed, and of the right honourable ſir *Robert Cecil* knight, principal ſecretary to your highneſs, and now earl of *Saliſbury*, being the honourable well affected friends, as well of the ſaid *William* earl of *Derby*, and other the iſſues male deſcended of that honourable houſe, as of the ſaid ladies heirs general, which ſaid honourable perſons are elected to end the ſaid controverſies, having deliberately heard the ſaid parties and their learned counſel and officers,

officers, and ſuch other their loving friends as were authorized to deal therein, and having adviſedly heard and conſidered of their ſeveral rights, titles and claims, did by the conſent and agreement of all the ſaid parties and their counſel, officers and friends, for the appeaſing, ending and extinguiſhment of all variances, claims, titles and controverſies then moved and grown, and which then after might ariſe and grow between the ſaid parties, or any of them touching the premiſſes, agree, order and determine (amongſt other things) That ſuch and ſo many of the ſaid caſtles, manors, lands, tenements and hereditaments late parcel of the poſſeſſions and hereditaments of the ſaid *Ferdinand*, late earl of *Derby* in the towns, hamlets, villages hereafter mentioned, and in every or any of them, ſhould be aſſigned, conveyed and enjoyed unto, and by ſuch perſon and perſons, and of, for and during ſuch eſtate and eſtates, and with and under ſuch limitations, powers, liberties, declarations and ſavings, and in ſuch manner and form as hereafter is mentioned, limited and expreſſed; with which ſaid order and agreement ſo made by the honourable perſons, as well the ſaid *William* earl of *Derby*, and the counteſs *Elizabeth* his wife, and the reſt of the iſſues male deſcended from that honourable houſe of *Derby*, as alſo the ſaid honourable lady *Alice* counteſs dowager of *Derby*, and the ſaid ladies *Elizabeth*, *Anne* and *Frances* daughters to the ſaid late earl *Ferdinand*, before and until their ſeveral marriages, their ſaid huſbands, and they did, and yet do hold themſelves well contented and ſatisfied.

May it therefore pleaſe your moſt excellent majeſty, That it may be enacted, and be it enacted by your majeſty, the lords ſpiritual and temporal, and the commons in this preſent parliament aſſembled, and by the authority of the ſame, That all and every the caſtles, manors, lands, *&c.* late the poſſeſſion and inheritance of the ſaid *Ferdinand* late earl of *Derby*, in the towns, hamlets, villages and places hereaftermentioned, ſhall be from henceforth for ever aſſured and enjoyed unto, and by the perſons hereafternamed of and for ſuch eſtates and limitations, and with and under ſuch powers, liberties, proviſoes, exceptions, declarations and ſavings as afterwards expreſſed, and that the actual and real poſſeſſion of all and ſingular the ſaid caſtles, manors, lands, *&c.* ſhall be by authority of this preſent act, immediately from henceforth veſted, *&c.* in the perſons hereafter named in poſſeſſion, remainder and reverſion reſpectively for ſuch eſtates,

* P. 342.

eſtates, and with and under ſuch powers and ſavings as is hereafter expreſſed.

And afterwards in the ſame act concerning the manor of *Hope*, it is enacted,

That the ſaid *Alice* counteſs dowager of *Derby* during her life, and after her deceaſe, the ſaid *William* earl of *Derby* during his life, and after his deceaſe, *James* ſon and heir apparent of the ſaid *William* earl of *Derby*, and the heirs male of his body, and in default of ſuch iſſue, the ſecond, third, fourth, fifth, ſixth and ſeventh ſons of the ſaid *William* earl of *Derby* lawfully begotten, and the heirs male of their and every of their ſeveral bodies, lawfully begotten, ſucceſſively and reſpectively, according to the priority of their birth and age, one after another; and in default of ſuch iſſue, ſir *Edward Stanley*, knight, during his natural life, and after his deceaſe the firſt, ſecond, third, fourth, fifth, ſixth and ſeventh ſons of the ſaid ſir *Edward Stanley*, and the heirs male of their ſeveral bodies ſucceſſively; and in default of ſuch iſſue, *Edward Stanley* of *Bickerſtaff* eſq; during his life, and after his deceaſe the firſt, ſecond, third, fourth, fifth, ſixth and ſeventh ſons of the ſaid *Edward Stanley* and the heirs male of their bodies, ſeverally and ſucceſſively, and ſo *James Stanley* (brother of the ſaid *Edward*) and his ſeven ſons, ſhall and may have, hold and peaceably and quietly enjoy the ſaid manor of *Hope*, and all hereditaments in the pariſh of *Hope*.

And that the ſaid *William* earl of *Derby*, ſir *Edward Stanley*, *Edward* and *James Stanley* ſucceſſively in poſſeſſion to make leaſes for twenty-one years or under, or for one, two or three lives, or for any number of years determinable upon one, two or three lives, in poſſeſſion, and not in reverſion, reſerving the old and accuſtomed rent.

A power for them to make jointures not exceeding a third part.

* P. 343. There is another act 7 Jac. to explain this proviſo.

* Provided always, and be it enacted and declared by the authority aforeſaid, That your moſt excellent majeſty, your heirs and ſucceſſors, and all and every other perſon and perſons, bodies politick and corporate, their heirs and ſucceſſors, executors, adminiſtrators and aſſigns, and every of them, other than the perſons to whom any eſtate or eſtates are before limited or mentioned to be limited by this preſent act, and their heirs, ſhall have, hold and enjoy all and every ſuch and the ſame eſtate and eſtates, leaſe and leaſes, rights, titles, intereſts, reverſions, rents, annuities, penſions, ſervices, tenures, primer-ſeiſins, liveries, actions, ſtatutes, bonds, recognizances, debts, executions, judgments,

ments, entries, conditions, covenants, warranties, uſes, poſſeſſions, offices, commons, liberties, eaſements, profits, commodities, emoluments, claims and demands as your highneſs, your heirs and ſucceſſors, or any of them, or any other perſon or perſons, bodies politick or corporate, their heirs, ſucceſſors, executors, adminiſtrators or aſſigns, other than the perſons before excepted to whom any eſtate or eſtates is before limited by this act, now lawfully have, or hereafter ſhall or may lawfully have or claim of, into, out of, or for any the ſaid caſtles, manors, lands, &c. in ſuch and the ſame manner and form, to all intents, conſtructions and purpoſes, as if this preſent act had never been had or made.

That *Alice* counteſs of *Derby* was widow and relict of the ſaid earl *Ferdinand*.

That the ſaid ſir *Edward Stanley* knight, at the making of the ſaid act, was a perſon who ought to have the ſaid lands after the death of the ſaid *James*, ſon of the ſaid *William* earl of *Derby*, without iſſue male of his body, by virtue of the ſaid letters patent.

That the ſaid *Edward Stanley* of *Bickerſtaff*, was next to take after the iſſue male of the ſaid ſir *Edward*.

That the ſaid *James* was next after his brother *Edward* and his iſſue.

1 *May* 1636. *Alice* died.

Earl *William* entered and was ſeiſed *prout Lex*.

29 *September* 1642. earl *William* died ſeiſed, and *James* his ſon entered and became ſeiſed *prout Lex*.

The ſaid earl *James* had iſſue *Charles*, afterwards earl of *Derby*.

15 *October* 1651. earl *James* died ſeiſed, and earl *Charles* entered.

* 14 *February* 1653. the ſaid earl *Charles* and *Dorothea Helena* his wife, by indenture tripartite between them of the firſt part, ſir *Charles Wooleſly*, *Richard Knightley*, *John Twiſleton*, *John Hewley*, *Rowland Jewkes* and *Joſhua Sprig* of the ſecond part, and *Thomas Crachley*, *Nicholas Brereton* and *Roger Griffith* of the third part, for 1700*l.* to the ſaid earl, and 1898*l.* 10*s.* to the truſtees for ſelling the ſaid eſtate by the parliament, paid by the ſaid earl's appointment, grant the ſaid manor of *Hope* to the ſaid ſir *Charles Wooleſly*, *Richard Knightley*, *John Twiſleton*, *John Hewley*, *Rowland Jewkes* and *Joſhua Sprig*, and their heirs, with warranty againſt the ſaid earl and his heirs, executed by livery. * P. 344.

10 *April* 1654. the ſaid earl and his wife levied a fine at the

the great ſeſſions, with a general warranty to the uſes in the indenture.

That the grantees entered and continued in poſſeſſion from the time of the making the ſaid indenture, and that the defendants are ſtill tenants to the grantees.

21 *December* 1672. earl *Charles* died, leaving iſſue the leſſor of the plaintiff, then of the age of ſixteen years, nine months and four days, and no more.

2 *February* 29 *Car.* 2. earl *William-George-Richard* made the leaſe *prout.*

They find the ſtatute of 34 *H.* 8. *cap.* 20. and conclude generally.

Before I come to the main points of the caſe, I ſhall only mention what hath been, or (at leaſt) ought to be allowed on both ſides, *viz.*

Conſideration. 1. That the conſideration paid for this land by the feoffees of *Charles* earl of *Derby* is not material one way or other.

Reverſion in Crown. 2. The reverſion continues in the crown, notwithſtanding the fine, feoffment or act of parliament.

4 Jac. 3. If this act of 4 *Jac.* had not been made, the firſt eſtate-tail could not have been barred.

Diſcontinuance, Lit. ſect. 625. 4. If the eſtate-tail is not barred, neither the feoffment nor fine made any diſcontinuance; for *Littleton* ſays, *ſect.* 625. That none can diſcontinue an eſtate-tail, unleſs he diſcontinue the reverſion; and therefore if the tenant in tail infeoff the donor, it is no diſcontinuance of the entail.

Warranty. * P. 345. * 5. The warranty contained in the fine of 1654, doth no prejudice to the eſtate of the iſſue of *Charles*, becauſe 'tis a lineal warranty, and there is no aſſets found.

Theſe things being premiſed, there are but two points to be ſpoke unto.

1. What effect the fine in 1654. hath, taking it abſtractively from the ſtatute of 34 *H.* 8. *cap.* 20.

2. What influence the ſtatute of 34 *H.* 8. hath in this caſe.

1 Point. *As to the firſt.* The caſe is no more but this, tenant in tail, the reverſion in the crown, after the ſtatute of 4 *H.* 7. *cap.* 24. and before 34 *H.* 8. levies a *Fine come ceo, &c.* with proclamations, and hath iſſue and dies, Whether his iſſue be by this fine barred?

And as to this point, I do conceive, that if the ſtatute of 4 *H.* 7. will not enable the operation of the fine to bar the

the iſſues, the ſtatute of 32 *H.* 8. *cap.* 36. will not, becauſe there is a proviſo in that ſtatute, that the ſame ſhall not extend to fines levied of lands granted to the conuſor or his anceſtors in tail, by letters patent from the crown, the reverſion whereof at the time of the levying the ſaid fine being in the crown; but that every ſuch fine ſhall be of like force as they were or ſhould have been, if the ſaid act had never been had or made. Proviſo in 32 H. 8.

So that now I muſt conſider what power tenant in tail had to bar his iſſues by the ſtatute of 4 *H.* 7.

And I am of opinion, that the iſſues were not barred by ſuch fine, by the ſtatute of 4 *H.* 7.

To prove this, 1. It will not be denied, but that a fine levied before 4 *H.* 7. would not have barred the iſſues. It would have been a diſcontinuance, but not a bar. *Ipſo jure ſit nullus, viz.* it ſhall not bind the right, but prevent the entry. *Co.* 2 *Inſt.* 336. For the ſtatute of *Weſtm.* 2. *de donis*, reciting the form of fees-ſimple conditional, which are now eſtates-tail; and the miſchiefs, that the feoffees after iſſue had power to alien, and to diſinherit the iſſues, and to prevent the poſſibility of reverter to the donor, which was totally againſt the intent, and therefore *durum videbatur, i. e. iniquum*, ſays the lord *Hob.* 336. That ſtatute ordains, *quod non habeant illi, quibus tenementum ſic fuerit datum, poteſtatem alienandi*; and that if any fine ſhall be levied, *ipſo jure ſit nullus.* The matter mentioned in this ſtatute was ſo * plauſible, that it wrought much upon the minds of men, inſomuch as they were ſo far from finding out of ways to alien, that they thought themſelves bound in conſcience, as well as by the words of the ſtatute, not to alien, as we may ſee in *Doctor & Student* in his firſt book. And *Littleton* ſays, 362. That a condition to reſtrain tenant in tail from aliening farther than for his own life, is good; for that ſuch farther alienation amounting to a diſcontinuance is contrary to good right, *fect.* 363. And though the project of juſtice *Rickil* in the time of *R.* 2. and of *Thirning* in the time of *H.* 5. took no effect, yet afterwards many conveyances to uſes to make perpetuities were contrived, and never judicially examined till the time of queen *Elizabeth.* Co. 2 Inſt. 336. * P. 346. Dr. & Stud. l. 1. Lit. ſect. 362, 363.

About five years after, *viz.* 18 *E.* 1. was the ſtat. of *Modus levandi Fines* made, which ſays, That a fine levied ſhall bar parties and privies, by which word, *Privies*, is meant only privies in blood, and not privies in eſtate, ſays the lord *Coke* 2 *Inſt.* 516. And whereas the words of that act are, *And all other people of the world*, yet do they not abrogate the ſtatute of *Weſtm.* 2. which provided for preſervation Co. 2 Inſt. 516, 517.

ſervation of eſtates-tail, *fol.* 517. And the iſſue in tail claims not from his anceſtor in privity of blood or eſtate, but *per formam doni*, and therefore not concerned in ſuch fine, unleſs by eſtoppel, ſo as not to plead *qd' partes finis nihil habuerunt*. For before 26 *H.* 8. though tenant in tail were attainted of treaſon, his iſſue ſhould inherit, for the legal blood was not corrupted. And *Littleton* ſays, That if tenant in tail infeoff his ſon within age and die, the iſſue in tail ſhall be remitted, being (as the lord *Hobart* ſays, *fol.* 71.) a kind of third perſon, by the intent of the ſtatute of *Weſtm.* 2. though *Fitz. Remitter* 13. be of a contrary opinion.

Hob. 71.

F. Remitter 13.

The ſtatute of 27 *E.* 1. *de Finibus levatis* doth take away the heir, either in fee or tail from pleading *quod partes Finis nihil habuer'*. But that was not in reſpect of the eſtate-tail; but by reaſon of the natural blood between the heir and anceſtor; and 'twas only in reſpect to fines, that they ſhould be an eſtoppel to ſuch pleas.

Then the ſtatute of non-claim 34 *E.* 3. *cap.* 16. reaches not to iſſues in tail, becauſe they were not concerned in claims.

Then comes the ſtatute of 4 *H.* 7. which ſays, That after the ingroſſing of every fine to be levied in *C. B.* of any lands, the fame ſhall be openly and ſolemnly read and proclaimed; and the ſame to be a final end, and conclude privies and ſtrangers.

* P. 347. * Now no reaſon appears why privies in 4 *H.* 7. ſhall include iſſues in tail, more than in 18 *E.* 1.

As to the objection, That if it had not been for the ſaving, all eſtates-tail, remainders, and all others had been barred; I anſwer, I cannot ſee any more reaſon for that, than why eſtates-tail ſhould not be within the ſtatute of *Præmunire*; the words whereof are, *That all the lands ſhall be forfeited to the king*. And yet in *Trudgin's* caſe, *Paſch.* 21 *Eliz. Co.* 3 *Inſt.* 126. It was reſolved, That tenant in tail ſhall forfeit only during his life; for, by the word *forfeit*, ſhall be intended only ſuch lands as he may lawfully forfeit; ſo here, a fine levied of lands, *i. e.* of ſuch lands of which a fine might by law be levied; but of lands intailed, the fine *ipſo jure fit nullus*, ſays, *Weſtm.* 2. And the court ought not before the ſtatute of 4 *H.* 7. to take a fine of tenant in tail, *Mich.* 22 *E.* 3. 18. *b. pl.* 84. And if there was tenant in tail, in reverſion expectant upon an eſtate for life, tenant for life ought not in a *Quid juris clamat* to attorn; for 'twas a good plea, that the conuſor was tenant in tail. *Trin.* 2 *E.* 3. 23. *pl.* 8. *Trin.* 37 *H.* 6. 33. *a. pl.* 19.

Co. 3 Inſt. 126.

Mich. 22 E. 3. 18. b. pl. 84.

Mich.

Mich. 2 *E.* 2. *Fitz. Age* 77. 1 *Roll. Abr.* 188. *B. pl.* 16. *Mich.* 48. *E.* 3. 23. *a. pl.* 7. *Co. Lit.* 318. *a.* and 3 *Co.* 86. *a.*

The lord *Hobart* in his argument of *Mackwilliam*'s caſe, ſays, that there was a great fight between intails and fines: how far fines had operation upon them, was very doubtful, *Jones* 39. And the very ſtatute of 32 *H.* 8. ſays, that by diverſity of interpretation and expounding of 4 *H.* 7. it had been and then was doubted, and called in queſtion, whether fines levied according to 4 *H.* 7. by tenant in tail, ſhould bind the iſſues, and by reaſon thereof divers debates, controverſies, ſuits and troubles were begun and moved; and very certainly ſo it was; for *Paſch* 19 *H.* 8. 6. *pl.* 5. *Dyer* 2. *b.* the very point came in queſtion, and before all the juſtices at *Serjeants-Inn*, there were three one way, and five the other; and *Brook* was one of the five who held that the fine ſhould bar. And yet he himſelf in his abridgment, *Tit. Aſſurances* 6. & *Fines de Terres* 121. ſeems to be of opinion, that ſuch fine did not bar; for he ſays, that if tenant in tail, the reverſion in the crown, levies a fine with proclamations, the iſſues are barred by 32 *H.* 8. Now that ſtatute left the validity of the fine to what it was before. But *Br. Tail* 41. is, that a recovery barred the iſſues before 34 *H.* 8. as the lord *Coke* cites *Brook, Co. Lit.* 372. *b.* and ſays it was ſo adjudged 28 *H.* 8. But the book in *Brook*'s *Abridgment* names * no time; by which it appears that the lord *Brook* had retracted his opinion, or the reporter was miſtaken. And as Dr. *Pollexfen* well obſerved, *Brook* was made chief juſtice of *C. B.* 2 *Mar.* and was either a judge, or at the height of his practice in 38 *H.* 8. about which time he was of the opinion cited by the lord *Coke*, and he lived near the making of the ſtatute of 32 *H.* 8. and ſo might better know the conſtruction of it. His abridgment was publiſhed 16 *Eliz.* after his death, *Co. Epiſt. ad* 9 *Rep.* He likewiſe cites *Dyer* 52. but there is no ſuch caſe; and he cits *Plowd.* 555. and 'tis very true that *Manwood arguendo* ſays as much.

19 H. 8. 6. Dyer 2. b.

Br. Aſſ. 6. and Fines de Terres 121.

Br. Tail 41. Co. Lit. 372.

* P. 348.

This could not be the ſame Brook in 19 H. 8. but another I think.

Dyer 32 pl. 1.

My lord *Coke* ſays likewiſe in the ſame place; and in 2 *Inſt.* 516 and 517. That if tenant in tail after 4 *H.* 7. had levied a fine, by virtue of that ſtatute, and 32 *H.* 8. it had barred his iſſues; and ſo doth the lord *Hobart* in the argument of *Mackwilliams's* caſe 332. but not 4 *H.* 7 alone; and *fol.* 346. he ſeems that alone could not do it; ſo that when I read their books I cannot but give very great reverence to them; but I muſt acknowledge myſelf unable to underſtand

underſtand them, or how the law came to be ſo, and therefore I leave them to their own opinions with all due reſpect.

Object. The lord *Hobart* 332. cites *Paſch.* 28. *H.* 8. That a fine by tenant in tail, the reverſion in the crown, bound the iſſues by 4 *H.* 7.

Reſp. The very caſe intended by the lord *Hobart* as is moſt probable, becauſe of the ſame term and year as in *Dyer* 32. *a. pl.* 1. And there the queſtion was demanded of the juſtices of *C. B.* by *Say* a counſellor of *Lincolns-Inn*, upon what occaſion it appears not. So it may be extrajudicially, and for his own ſatisfaction, without any cauſe depending; but here the juſtices ſeemed to hold that the iſſue were barred; and *Ingleſield* ſaid he knew it by experience, but *Shelley* doubted, and ſo there was judge againſt judge.

I will not mention the lord *Stafford's* caſe, 8 *Co.* 74. *a.* and 6 *Co.* 55. *a.* Seignior *Chandos's* caſe, which have been cited at the bar, that ſuch fine will not bar, becauſe thoſe caſes were after 34 *H.* 8.

He was a Practicer in Trin. 27 H. 8 as appears in Trin. 27 H. 8. 22. pl. 14.

But I think Dr. *Denſhal*, who read upon 4 *H.* 7. a very great while ago, may be cited, who holds that tenant in tail is out of the ſtatute of 4 *H.* 7. as you may ſee *fol.* 11 and 12.

The obſervation made by Dr. *Saunders* at the bar is not to be omitted, *viz.* that between 4 *H.* 7. and 26 *H.* 8. there were almoſt fifty years, and yet in all that time no eſtate-
* P. 349. * tail was ever forfeited for treaſon. And what reaſon had the judges to conſtrue the general words of 4 *H.* 7. that a fine ſhould bind as well privies or ſtrangers, that the iſſues ſhall be bound by a voluntary act of tenant in tail, and yet that he ſhall not forfeit his eſtate for treaſon, which is the higheſt offence?

Add to this, that *St. Germin* in his book called *Doctor & Stud.* written 23 *H.* 8. and commended by the Lord *Coke* in his epiſtle to his 9th *Rep.* when he examines the queſtion how common recoveries of lands intailed might ſtand with conſcience, *Lib.* 1 *cap.* 26. *fol.* 41. never mentions fines, and certainly he would not have omitted them had they been uſed to have been then levied of intailed lands; for iſſues were as much prejudiced by them as by common recoveries. 1. From the penning of the act of 32 *H.* 8. The words whereof are, *be it enacted*, not *declared.* 2. That fines heretofore levied, which ſhews that fines were levied of intailed lands, but wanted the ſupport of an act of Parliament. 3. That this act ſhall not extend to lands, whereof the reverſion is in the King, but that every

ſuch

ſuch fine ſhall be of like force as it was or ſhould be if this act had not been made. Then cometh the Statute of 34 *H.* 8. which ſays, that there was a greater miſchief by this doubt for a recovery, but not by a fine, which ſhews that fines were not uſed in ſuch caſes.

True it is, that recoveries did bar the iſſues before 34 *H.* 8. as 'tis reſolved in *Wiſeman*'s caſe, 2 *Co.* 16. *a.* and reaſon there was for it. 1. By reaſon of the pretended recompence as in *Octavian Lumbard*'s caſe, 44 *E.* 3. 21. cited in 1 *Co.* 94. *b.* tenant in tail grants a rent for a releaſe of one who hath right to the land, it ſhall bind the iſſues. 2. But adly, for the reaſon given by brother *Maynard*, that recoveries in adverſary writs did bar in all caſes, till the *Quod ei deforceat* was given by *Weſtm.* 2. 4. which was the ſame Parliament that the ſtatute *de Donis* was made. And ſo is 19 *E.* 3. *F. Recovery in Value* 20 *Hill.* 23 *E.* 3. *F. Recovery in Value* 13. 44 Aſſ. 35. *Mich.* 44 *E.* 3. 29 *b. pl.* 9 *Paſch.* 5 *E.* 4. 2. *a. pl.* 11. 10. *Co.* 43. *b.* But in caſe of fines it was otherwiſe.

And yet to prevent all doubts in that caſe the judges have conſtrued the Statute of 34 *H.* 8. to extend to fines, as appears by *Notley*'s caſe, cited in *Stafford*'s caſe, which though objected againſt as not to be found elſewhere, yet it is no ſpurious caſe; for 'tis reported again by Baron *Savil* 105. *pl.* 183. where the caſe upon a replevin (upon which the * pleading is ſet out at large) was, that king *H.* 8. being * P. 350. ſeiſed in fee in right of his Crown, granted the lands to *Philip Van Wilder* in tail male, after whoſe death the ſame deſcended to his ſon *Henry Van Wilder*, to whom *Weſton* and *Gibs* acknowledged a fine, and he granted and rendered the land to them for 4000 years, and then died. And whether this leaſe were good, being made by *fine ſur render* to bind the iſſues in tail, was the queſtion, and no judgment; but ſeemed that it did not bind.

So that upon the whole matter, as to this point I hold, that though this caſe be out of the Statute of 34 *H.* 8. yet not alienable by the Statutes of 4 *H.* 7. or 32 *H.* 8.

I come now to the ſecond great point, *viz.* what influ- 2 Point. ence the Statute of 34 *H.* 8. hath upon this caſe.

In handling of which the great difficulty will appear to ariſe out of the conſtruction of the private act of 4 *Jac.*

For the true intelligence whereof we are to conſider,

1. The miſchiefs which had befallen the family of *Darby*.

2. The remedy which this act applies.

3. The conſequences which do ariſe hereby.

As for the miſchiefs, they appear in the preamble of the act, that by the death of Earl *Ferdinand*, who died without iſſue male, and left three daughters married into three noble families, thoſe daughters had no certainty of their portions; and lands they were as incertain of, though heirs at law to their father, the reaſon that the ſame were intailed upon the heir male of the family, either by the Crown, or by ſome precedent anceſtor. 2. The Lady *Alice* their mother and dowager, and relict of Earl *Ferdinand*, though intitled to dower, as the widow of one dying ſeiſed of lands of inheritance, yet not able to bring a writ of dower with any certainty, becauſe ignorant of the tenant of the freehold. 3. Some of the branches of the family, by reaſon of the antiquity either of the limitations of the eſtates found in offices, or ancient ſettlements, incertain which of them ſhall immediately ſucceed Earl *William* in caſe he ſhall die without iſſue male. And 4. All of them incertain what lands were ſettled one way, and what another; and hence aroſe diverſe variances, ſuits and controverſies.

The remedy was, that all the ſaid parties referred themſelves to five honourable perſons who were well affected friends of all of them; and thereupon they award the lands to be ſettled as in the act.

* P. 351. * The conſequence of which will be either one way or other, as the true conſtruction of the ſame act ſhall happen to be made, *viz.*

Whether this act thus ſettling the lands hath altered, and made the eſtate formerly ſettled in the family, another eſtate ſubſtantially or ſpecifically (as the logicians ſay) different from what it was before; for if the eſtate do now become new, then 'twill be for the defendant; but if the old eſtate-tail did remain in Earl *Charles* when he made the conveyance, it will be for the plaintiff.

And I am of opinion, that the eſtate-tail granted by the letters patent is not altered by the act of Parliament.

And my chief reaſon ſhall be taken from the intent and meaning of the act, and of all the parties concerned, which being only a private act, is to be conſidered as a ſettlement made by the legiſlative power of the kingdom. 1 *Co.* 47. *b.*

Wherein the parties to be more eſpecially taken notice of, are,

1. The *Derby* family.

2. The Referees.

3. The King. Every of which we cannot but preſume had notice of the letters patent.

1. For

1. For were it not for them, it doth not appear by the record how the daughters of Earl *Ferdinand* could be disturbed from enjoying the lands in question as heirs at law to their father; were it not for them, Earl *William* could have no pretence.

2. The Referees must needs know of them; for one of the Referees was then Lord Treasurer, and there is a rent of 50*l. per annum* reserved, and in charge in the Exchequer.

3. The King's counsel could not but know them; for in all acts of Parliament, 'tis their duty to examine how far the the Crown's interest is concerned.

And this knowledge and notice of the letters patent produced the words so frequently in the acts, *viz.* In the recital of the award, *that all the said lands which were of the Earl* Ferdinand *should be assigned, conveyed and enjoyed, unto, and by such persons, for such estates, and with and under such limitations, powers, liberties, declarations and savings as is afterwards expressed.* 3. *And* * *that the same shall be vested, adjudged, deemed and taken to be in the said persons for such estates, and with and under such powers, liberties, provisoes, exceptions, declarations and savings, as afterwards is mentioned, declared, limited and expressed.* 4. The proviso itself. * P. 352.

All which do shew that the act was intended to pass *sub modo*, and that there should be somewhat preserved from being destroyed thereby; and in truth so there was.

For by the letters patent it appears; that the patentees (under whom the lessor doth derive) were persons well deserving of the Crown; and therefore *ob singulare & fidele servitium qd' nobis præcnitea impenderunt, ac pro bono & fideli servitio nobis & Hæridibus nostris regibus Angliæ per eosdem Thomam & Georgium & Hæredes suos pro defensione nostrâ & regni nostri contra quoscunq proditores inimicos & rebelles quoties futuris temporibus opus erit impendend. &c.* the King grants; so that he did not only respect what was past, but also service to be done for the future; and not only by them, but their descendents and heirs, and to the King and his heirs.

Now whether this would make any condition or tie of any sort in law upon the estate, may be doubtful, though *Hob.* 41. says, that *pro & in consideratione*, do not regularly, and in the case of a common person, purport a condition.

But most certain it is, that the King and his counsel intended that those words should signify somewhat.

The Parliament in 11 *H.* 7. had so great regard to such gifts of offices or annuities, that they bound the grantees to attend the King and his heirs in person in his wars, upon

pain of forfeiture, though there was no such consideration mentioned in the patent; as you may see 11 *H.* 7. *cap.* 18.

And the act of 34 *H.* 8. takes notice; for the words are,

To the intent that recompence for such service of the donees should not only be a benefit for their own persons, but a continual profit for the heirs of their bodies, whereby such heirs should have in special memory, and daily remembrance, the profit that they have, and take by the service of their ancestors done to the Kings of this realm, and thereby be the better encouraged to do like service to their sovereign lord, as to their duties of allegiance appertaineth.

* P. 353. * And the advantage the Crown receives by such remembrance in public families is not final, and therefore the ground of that act was very considerable both for the King's honour and his profit.

Now this advantage is utterly lost if the estate granted by *R.* 3. be altered by this act of 4 *Jac.* which as the times then were, and as the family of the house of *Derby* was then affected, would never be allowed, either by the King or any of the parties concerned in the act: for observe the time of the making the same; 'twas the next year after the attempt of the gun-powder treason, and not quite, or at least but two years after an attempt, or at least an apparent inclination of another contrary party against the Crown and established government, as appears by the resolution in 2 *Cr.* 37. So that had any of the parties or the King been asked whether they intended to dissolve the tie (of honour at least) between the family and the crown, in relation to the service they owed to the crown specified in the first gift, they would have returned a negative answer without doubt.

Add to this, that the proviso itself is not a bare saving, which might have been excepted against, as opposing, or not well consisting with other parts of the act, as in *Porter's* case it is objected; but it is an enacting clause, whereby it is enacted, *that the king shall have, hold and enjoy all such and the same rights, titles, profits, commodities, emoluments, claims and demands, as if the act had not been made.*

By all which it most plainly appears, that 'twas the intent of the act that the estate should not be altered.

Then, to construe this act otherwise, if possible to prevent it, is to make it support a fraud to the king. *Rex fallere non vult, falli non potest.* 12 *Co.* 3.

This being so, it must be considered, whether this intention can consist with the rules of law. In examination whereof the objections are in order to be considered.

Object.

Object. 1. The lady *Alice* hath an eſtate for life, which ſhe cannot have out of the old eſtate-tail of earl *William*.

Reſp. 1. This conſiſts with the former eſtate, becauſe but of a third part, and ſo in lieu of dower; and to prevent her danger of ſuit, which could not be with eaſe, for want knowledge of a right tenant of the freehold.

* 2. But however, ſhe is dead, and ſo no objection; for though that might have altered the intail, it would be but during the continuance of the eſtate for life, which is determined. * P. 354.

Object. 2. Earl *William* hath hereby only an eſtate for life.

Reſp. The act doth but pare away part of the intail, and leave an eſtate for life; for though an eſtate for life cannot be ſaid to be the ſame eſtate with the intail, yet the original intail is not hereby altered in the iſſue of earl *William*; as in the caſe of the lord *Delaware*, 11 *Co.* 1. he had an eſtate-tail in his honour, and diſabled for his life; and ſo part of the eſtate in the honour ſuſpended by act of Parliament; and this is here an execution of the agreement.

Object. 3. Earl *James* hath an eſtate in his father's life-time, which he could not have by the firſt intail.

Reſp. Here is no gift of an eſtate, but a diſtribution of the enjoyment of it, nevertheleſs conſiſtent with the former eſtate; for all is within the compaſs of the firſt intail: and it is but a confirmation of an agreement, as acts of Parliament for confirming incloſures, or eſtabliſhing cuſtom for common, or a partition between tenants in tail. And this act of Parliament works in this caſe, not by way of gift, but by ordinance, as letters patent, whereby the king may erect a fair, market, warren, park, foreſt, piſcary, or the like, by ordinance, without granting them to any, *Hob.* 15. the caſe of burgeſſes of parliament.

Object. 4. Earl *William* hath power to make leaſes, which he could not do as tenant for life.

Reſp. Such power alters not the eſtate, for it is but a collateral qualification, and ſuch a thing as may *adeſſe & abeſſe ſine interitu ſubjecti*.

Object. 5. Power in tenant for life, and in earl *William's* ſons, to make jointures.

Reſp. Obſerve, that the power is but of a third part, and ſo to ſupply dower, that there may be a writ of dower brought, wherein difficulty may be of finding a right tenant of the freehold.

Object. 6. If the parties ſhall bring a *formedon*, they muſt declare upon this act, and not upon the letters patent.

Reſp.

Resp. The heir need not bring any action, for he may enter. But 2. If he will bring his action, he muſt declare upon both letters patent and act; for ſuppoſe the intail be ſpent, * the king in a *formedon* in *reverter* muſt declare upon the letters patent only.

* P. 355.

Object. 7. In all eſtates-tail there muſt be donor and donee, and here the king cannot be the donor.

Reſp. An act of parliament can create an eſtate-tail without a donor; and where we ſee eſtates limited for a particular purpoſe, we are not to meaſure the validity of ſuch limitations by the ſtrict rules of the common law; for the parliament can control the rules of the common law, 13 *Co.* 64. It can make an eſtate of freehold to ceaſe as if the party were dead; as the eſtate of a parſon who accepts a ſecond benefice contrary to the ſtatute of 21 *H.* 8. of pluralities, 6 *Co.* 40 *b.* and for this cauſe the lord *Hobart* ſays, *p.* 346. That judges have authority to mould ſtatute laws according to reaſon and beſt convenience, to the trueſt and beſt uſe, eſpecially conſidering that the parliament procedes many crimes according to natural equity *ſecundum æquum & bonum*, which is *lex legum*, without reſpect to legal ceremonies. *Hob.* 224. So that where the drift and ſole intent of an act of parliament is moſt plainly diſcerned, as in this caſe, and yet that intention cannot be obſerved, were the ſame in a deed, by conſtruction according to the rules of law, we ought rather to preſume the parliament (in whoſe power it was ſo to do) reſolved to leap over and waive the rules of law, and to make a particular law for that occaſion. As for the purpoſe in the prince's caſe, 8 *Co.* 16. The honour of duke of *Cornwal* is limited to prince *Edward*, *& ipſius & hæred. ſuorum regum Angliæ filiis primogenitis & dicti loci Ducibus & Regni Angliæ hæreditarie ſucceſſuris.* By which, he that ought to inherit by virtue of that grant, ought to be the eldeſt ſon and heir apparent of the king of *England*, and of ſuch a king as is heir to prince *Edward*, and that ſuch an eldeſt ſon and heir apparent to the crown ſhall inherit the ſaid dukedom in the life of the king his father; and the lands there mentioned are accordingly annexed to the dukedom for the ſame eſtate.

Now by what rules of law could this grant be conſtrued in this manner? certainly by none, but the judges were forced to bend and conform their legal reaſon to the words of the act of parliament, and rather to conſtrue the words literally, and that the parliament intended to create a new limitation as well as a new title, rather than to ſtrain the ſenſe of the words,

words and the conſtruction thereof farther than ever the parliament intended. They did not ſtretch their invention to * find out legal reaſons for that limitation, as men that would ſhew themſelves more witty than ſerious, might have done. But *qui rationem in omnibus quærit, rationem confundit.* And they gave the ſame reaſon for their reſolution, which appears in this caſe, *viz.* That otherwiſe it would be impoſſible to make good that limitation; and if they ſhould not make ſuch conſtruction, the whole deſign of the act of parliament would be fruſtrated. So here the deſign was, that the agreement and award ſhould be performed, and yet the king not prejudiced, which cannot be if not conſtrued as the plaintiff would have it. * P. 356,

True it is, ſhould the letters patent be left out of the verdict, and the differences, and the award and the agreement and proviſo ſtruck out of the act of parliament, I ſhould not doubt but to account the eſtates therein mentioned to be all new, and that all the eſtate in the letters patent, except the king's reverſion, to be totally altered; but all thoſe things conſidered together, I think it muſt neceſſarily be otherwiſe.

Object. 8. The act of 34 *H.* 8. ought to be ſtrictly conſtrued, becauſe it reſtrains alienation.

Reſp. If it were to reſtrain ſuch alienations as are favoured in law, *viz.* Of tenant in fee-ſimple, or tenant in tail of the gift of a ſubject, whereby trade and commerce might be prevented, debts unpaid, and children unprovided for, which is the reaſon that the law diſallows of perpetuities and conditions which reſtrain alienation, doubtleſs the act were to be conſtrued ſtrictly.

But this act carries a reaſon in its preamble anſwerable to thoſe inconveniencies, *that the grantees ſhould not alien, for that the lands were given to the intent that recompence ſhould not only be to the donees for their ſervice, but a perpetual profit to their heirs of their bodies, whereby ſuch heirs ſhould have in ſpecial memory, and daily remembrance, the profit that they have and take by the ſervice of their anceſtors done to the kings of this realm, and thereby be the better incouraged to do like ſervice to their ſovereign lord, as to their duties of allegiance appertaineth.*

Now the ſaid inconveniencies will not fail in ſuch caſes.

1. Becauſe the lands thus diſpoſed are not many, *et ad ea quæ frequentius accidunt jura adaptantur.*

2. They are to perſons generally of noble families, of whom the crown hath always a care.

3. This

* P. 357. * 3. This law is for support of the crown and government, which ought to be secured before all private interests.

Object. 9. The tenure is altered by this act of parliament.

Resp. Tenure is not an essential quality to an estate, for there are estates whose tenures may be gone, and yet the estate remains; as suppose the king had released the tenure of knights service, and that the patentees should hold in socage, yet the estate-tail had continued the same. 4 *Co.* 9. *a.* If a mesnalty become a rent-seck by surplusage, the ancient seisin is sufficient. 1 *H.* 4. 4. If *H.* recovers in an assise, a rent-service, and afterwards that rent becomes a rent-seck and he is disseised of it, he shall have a redisseisin, because the substance of the rent remains, though the quality be altered. *Co. Lit.* 154 *b.*

Object 10. The estate-tail was without impeachment of waste, so is not the estate for life here.

Resp. The quality of being without impeachment of waste makes no alteration. 3 *Cro.* 40. *Clare* versus *Pepys.*

Object. 11. By the letters patent there was one intire estate given, but here are several estates for life, and estates-tail, which are not intire.

Resp. These estates are all the same in quantity, which they would have been without the act; and it is the same estate as to duration, for all the estates here do arise out of the original estate-tail, and the reversion is not touched.

Object. 12. Lastly, these estates do arise out of the estate-tail, and are to continue no longer, and are distinct from it; as if tenant in tail bargain and sell to one and his heirs, the bargainee hath fee, and the estate granted continues till the issue enters.

Resp. True it is, that such construction may be made in a conveyance, and so might it have been in this act, had not the intent appeared otherwise; but therefore it shall not be so construed here, because it would prejudice the king's interest contrary to the proviso.

And in the exposition of an act of parliament we need not labour in maintaing its conformity to the rules of law, when its design is for another purpose.

Tenant in tail makes a lease for three lives, by 32 *H.* 8. this cannot be made good by the rules of the common law.

* P. 358. * As for authorities in this case, *Gardiner's* case 14 *Car.* 2. cited by my brother *Weston*, is nothing to this purpose, which was, that *H.* 8. gave to *Michael Stanhope* and his

his wife, and the heirs of their bodies certain lands, *Michael* dies, the lands descend to *Thomas Stanhope* his son and heir, who petitions the queen to grant the reversion to some persons in fee, to the intent that he may make a lease for ninety-nine years by way of mortgage, and enters into a recognizance to the queen, conditioned, that nothing shall be done whilst the reversion is out of the crown, prejudicial to the crown.

The queen conveys the reversion to the lord *Burleigh* and Sir *Walter Mildmay* in fee, *Thomas Stanhope* makes a lease and then suffers a recovery, the trustees reconvey to the queen.

Resolv. 1. 'Twas a good grant.

2. *Thomas Stanhope* was not restrained from aliening.

But I may resemble this to the case of *Falkner* and *Bellingham, Mich.* 3 *Car.* 1. in *C. B.* reported by 1 *Cr.* 80. and *Jones* 233. The case was this, *Ultimus presbyter celebrando divina* in the church of *East Grinsted* was seised in fee of a messuage and lands *in jure presbyteratus sui*, and held them of the lord of the manor of *Brambleton*, by the rent of 18*s.* and other services, who became seised of the rent. By the statute of 1 *E.* 6. *cap.* 14. this messuage and lands became forfeited to the crown; but in that statute there is a saving of all rents and services to all other persons. The king granted the lands over, and no seisin was had of the rent for above forty years after the statute of 1 *E.* 6. And whether seisin within forty years was necessary, or no, was the question; for if it were the same rent, then seisin was necessary; but if a new rent created by the statute, then seisin was not necessary. And resolved by three justices *contra* two in *C. B.* that it was a new rent; and there held by the three justices, that this rent being originally a rent-service, was now turned into rent seck by the act of parliament, and became a rent coming out of the womb of the parliament, as justice *Hutton* called it; and though it were the same rent in estate, as if there were tenant for life, the remainder in fee, or if descendible on the part of the mother; so now; yet altered in quality.

But the other two justices, and the whole court of *B. R.* wherein the first judgment was reversed, resolved, that it is the same rent to all purposes, and 'tis parcel of the * manor as before. And it is not a rent given by the statute, because a saving never amounts to a gift of any new thing, but is *quasi* an exception out of the statute, where otherwise it would be extinguished and lost. * P. 359.

And

And they reſolved, that though the tenure was deſtroyed, it remained the ſame rent in ſubſtance, and in all other things; as if an arrow loſes one or two feathers, yet it is an arrow ſtill, or if *H.* loſes ſome members, he continues a man ſtill.

As to the Objection, that if the act ſhall be thus conſtrued, this will be very miſchievous, becauſe there are many purchaſors for valuable conſideration, and it will blow up their eſtates;

Reſp. 1. There can be no caſe adjudged, but muſt be miſchievous to ſome body; as 1 *Co.* 53. *a. b.* But

2. The miſchief appears not in the record.

3. Better ſuffer a miſchief than an inconvenience; for ſhould this act be conſtrued againſt the intention, the king muſt loſe the advantage before mentioned; and to expound an act ſo, would be generally inconvenient; and ſo I conceive judgment ought to be given for the plaintiff.

In this caſe the court of Exchequer was divided, *viz.* *Mountague* chief baron, and myſelf for the plaintiff, and *Atkins* and *Gregory* for the defendant; and thereupon the cauſe was adjourned into the Exchequer Chamber, where it was argued again by counſel three ſeveral times, and alſo by eleven of the judges; for that *North* chief juſtice of *C. B.* was made lord keeper laſt vacation; and all the judges, except *Gregory*, *Atkins* and *Dolben*, gave their opinions for the plaintiff.

As to the firſt point, all but *Jones*, *Charlton* and myſelf, were of opinion, that the iſſue of tenant in tail was barred by a fine levied by his anceſtor, by virtue of the ſtatute of 4 *H.* 7. before the ſtatute of 32 *H.* 8. And all who argued for the plaintiff agreed, that the act of 4 *Jac.* did not deſtroy the eſtate created by *R.* 3. but was only an inſtrument to perfect the agreement made by the arbitrators in the *Derby* family. The lord keeper's opinion was delivered by the chief juſtice *Pemberton*, by the lord keeper's direction, accordingly.

Memorandum, This Term were made Serjeants, of the *Inner Temple*, Sir *G. Jeoffries* Recorder of *London*, Sir *J. Kelyng*, one of the King's Counsel, *Edmund West*, *R. Hanson*, Sir *Fr. Manley* and *W. Bugby*, Of *Gray's Inn*, *Edw. Bigland* and *W. Richardson* of *Lincoln's Inn*; *Rob. Wright* of the *Middle Temple*.

Kirton *versus* Guilder.

GUILDER sues the plaintiff in the ecclesiastical court at *York*, for procurations belonging to him as archdeacon, and libels, that for ten, twenty, thirty and forty years last past there hath been due and paid 6*s*. annually for the said procurations, by the said *Kirton* and his predecessors, parsons of *D*. And *Kirton* by *Hoyle* prays a prohibition, and suggests, that the said duty hath not been payable, and denies the prescription, and so the ecclesiastical court cannot have conusance of a prescription, which is properly triable by the common law. *Rastal's Ent.* 483. 2 *Roll. Abr.* 283. *pl.* 16. 2 *Roll. Rep.* 293. Prohibition.

But *Holt e contra*, that procurations are payable of common right, *Linwood* 67: as tithes are, and no action will lie for the same at common law; and a prescription in the ecclesiastical law may have a different commencement from what it hath by the common law, and a pension is suable in the ecclesiastical law. *F. N. B.* 151. *b*. Procurations.

Per Cur. A consultation is granted *quoad* procurations demanded generally; but if the plaintiff denied the *quantum*, then a prohibition.

William Cole Esq; *vers.* William Ireland Gent. *Leicest.*

THE plaintiff declares, that whereas 12 *November* 27 *Car.* 2. the king by his letters patent then dated had made him sheriff of the county of *Leicester*, *custodiendum quamdiu* Hundred. 2 Jones 194. Pollexf. 606. Skin. 41.

quamdin dicto Domino Regi placeret, which office is an ancient office, to which the right and title of naming and conſtituting a bailiff of the bailiwick of the hundred of *Gartree* in the ſaid county time out of mind hath belonged, and ſtill
* P. 361. is incident, annexed and inſeparable from the ſame; * and that every ſheriff of the ſaid county for the time being, hath from time to time named, conſtituted and ought to name and conſtitute a bailiff of the bailiwick of the hundred aforeſaid, and hath held, and of right ought to hold a view of frankpledge of the hundred aforeſaid, and a court of the ſaid county; and by occaſion thereof divers fees, commodities, profits and emoluments had and received, and of right ought to have and receive as incident thereunto. 29 *March* 28 *Car.* 2. The defendant at *Turlangton* and elſewhere in and through the ſaid hundred took upon him, and exerciſed the ſaid office for the ſpace of ſix months againſt the will of the plaintiff, and without any right or lawful authority, and without the plaintiff's conſent or nomination, the plaintiff being all the while ſheriff of the ſaid county: And alſo the ſame 29*th* of *March* 28 *Car.* 2. at *Shankton* in the hundred aforeſaid, the defendant did of his own wrong, and without right or lawful authority hold a view of frankpledge of the ſaid hundred, and alſo a court baron, and ſeveral courts baron from three weeks to three weeks there did hold, and on that occaſion received ſeveral profits to the value of 5*l.* *ad damnum* 40*l.*

The defendant pleads Not guilty, and the jury find a ſpecial verdict, *viz.*

That the plaintiff was made ſheriff, as he declares.

That 12 *E.* 2. the king committed to one *John de Sadington* his hundred of *Gartree*, in theſe words. Leic. Rex ad requiſitionem Iſabellæ Reginæ Angliæ Conſortis ſuæ chariſſimæ commiſit dilecto ſibi Johanni de Sadington valecto ipſius Reginæ Hundred' Regis de Gartree cum pertin' in Com' Leic' cuſtodiend' quamdiu Regi placuerit Reddend' inde Regi per annum ad Scaccarium ſuum 16*l.* prout ad idem Scaccarium jam redditur pro eodem, Dum tamen Hundred' ill' cuſtodiat juxta formam Statuti nuper apud Lincoln' inde edit' & proviſ. In cujus, &c. Teſte Rege apud Eborum 6 Febr. per ipſum Regem Et Mandat' eſt Johanni de Greydeſton quod eidem Johanni de Sadington Hundred' præd' cum pertin' quod in cuſtodia ſua ex Commiſſione Regis exiſtit liberet cuſtodiend' in forma præd'. Teſte ut ſupra.

2 *October* 1 *H.* 4. The king granted the ſame to *William Hogkwick* in hæc verba. Rex omnibus ad quos, &c. ſalutem.

tem. Sciatis quod de gratia noſtra, ſpeciali & pro bono ſervitio quod dilectus Armiger noſter Willielmus Hoghwick nobis impendit & impendet in futuro conceſſimus eidem Willielmo Hundred' * de Gartree in Com' Leiceſt' cum pertin' Habend' pro termino vitæ ſuæ una cum omnibus firm' reddit' ſect' Cur' & omnibus aliis rebus proficuis & commoditat' ad præd' Hundred' quoquomodo rationabili ſpectan' ſive pertin' abſque aliquo nobis inde reddend' Aliquibus ſtatut' ſive ordination' ante dat' præſentium fact' non obſtan' In cujus &c. Teſte Rege apud Weſtm. 2. Octob. per breve de privato ſigillo. * P. 362.

19 *November* 15 *Jac.* The king granted the ſaid hundred to *William Ireland* father of the defendant, *Habend'* from *Michaelmas* laſt for twenty-one years, *Reddend'* 17*l.* 15*d.* and *ob. viz.* for the hundred of *Goodlaxton* mentioned in the letters patent 17*l.* 19*s.* 3*d.* and for the hundred of *Gartree*, 9*l.* 2*s. ob.* and 20*s.* of increaſe.

5 *September* 13 *Car.* 2. The king granted to the defendant the premiſſes in theſe words, *viz.* Cuſtod' ſive firm' ſeparal' Hundred' de Goodlaxton & Gartree cum omnibus & ſingulis eorum pertinen' in Com' Leic. Ac Officii & Officiorum Seneſchalli & Seneſchalſiæ Ballivi Ballivat' præd' Hundred' de Goodlaxton & Gartree & eorum alter' cum omnibus & ſingulis juribus membris pertin' proficuis advantagiis allocation' authoritat' præheminenc' libertat' & emolument' quibuſcunque eiſdem Offic' Seneſchalli & Seneſchalſiæ Ballivi & Ballivat' ſive Ballivorum vel Ballivatorum noſtrorum præd' Hundred' de Goodlaxton & Gartree & eorum alteri qualitercunque ſpectan' vel pertin' ac cum omnibus vadis feodis proficuis commoditat' & advantag' quibuſcunque eiſdem Officiis aut eorum alicui ut prædict' qualitercunque ſpectan' pertinen' ſive debend' una cum executione omnium & ſingulorum brevium proceſſ. præcept' ſummonitorum arreſtat' warrant, attachiament' & mandatorum noſtrorum hæred' & ſucceſſorum noſtrorum infra ſeparal' Hundred' præd' exequend' & emergen' adeo plene libere & integre ac in tam amplis modo & forma prout aliquis Ballivus vel aliqui Ballivi ſeparal' Hundred' præd' exequi vel facere poſſit vel poſſint debet vel debent gaviſus fuit vel habuit gaviſ. fuer' vel habuer' vel gaudere debuit vel debuere Necnon cuſtod' letarum viſ. franc' pleg' & cur' præd' ſeparal' hundred, & turn' vicecom. infra ſeparal' hundred' præd' & eorum alter. Ac omnium proficuorum earundem letarum viſ. franc' pleg' & cur' hundred' & turn' & eorum cujuſlibet

bet Necnon amerciament' fines pœnas forisfact' ſect' ſervic' reddit' perquiſition' cur' let' & viſ. franc' pleg' & omnium aliorum proficuorum commoditat' libertat' privileg' franchiſ. juriſdiction' & emolument' quorumcunque infra * ſeparal' hundred' præd' quoquomodo provenien' dictis ſeparal' hundred' & officiis præd' ſeu eorum alicui pertinen' ſpectan' ſive acciden' aut ut pars vel parcell' eorundem Hundred' Ballivi & Ballivat' ſeu aliquorum eorum habit' cognit' accept' uſitat' occupat' ſeu gaviſ. exiſten' cum libertate proclevation' & collectione eorundem infra ſeparal' hundred' præd' Ac etiam cuſtod' ſive firm' omnium & omnimodorum bonorum & catallorum felon' fugitivorum felon' de ſe & in exigend' poſit' condemnat' & utlagat' ſive waviat' bonorum waviat' & extrahur' emergen' creſcen' contingen' ſive provenien' dict' ſeparal' Hundred' & Ballivat' præd' ſeu eorum alicui quoquomodo ſpectan' ſive pertinen' aut cum eiſdem aut eorum aliquo uſitat' dimiſſ. locat' ſive gaviſ. Quæ quidem Hundred' & cætera præmiſſa per Literas noſtras Patentes dimiſſ. ſunt parcel' poſſeſſion' antiquæ coronæ noſtræ Angliæ. Excepi' tamen ſemper & extra hanc præſentem conceſſion' nobis hæred' & ſucceſſor' noſtris omnino reſervat' omnibus & omnimod' fin' amerciament' & exitibus annuatim & de tempore in tempus provenien' creſcen' ſive renovan' ſeu quoviſmodo forisfact' in aliqua cur' noſtra hæred' & ſucceſſorum noſtrorum de recordo ſive aliquibus cur' noſtris de recordo ſive coram Juſtic' noſtris ad Aſſiſas Juſtic' ad pacem ſive Clerico Mercati provenien' creſcen' acciden' emergen' ſive renovan' Ac etiam libertat' pro levation' & collection' eorundem infra ſeparal' Hundred' præd' Habend' from the making of the letters patent for thirty-one years. Reddend' annuatim 18*l.* and 15*d. ob.* and 10*s.* increaſe.

* P. 363.

The jury alſo find the ſtatutes of 2 *E.* 3. *cap.* 12. and 14 *E. cap.* 9. That the defendant did keep the courts and receive the profits of the hundred, as the plaintiff hath declared; and if the plaintiff be guilty they aſſeſs 5*l.* damage.

Lovel for the plaintiff. The ſingle queſtion is, Whether the grant of this hundred, and other things therein ſpecified be good? and I hold that the ſame is not good in law.

Hundreds and bailiwicks granted before *Edward* the ſecond's time are good, but not thoſe which have been granted afterwards. As to the original of hundreds before king *Alfred*'s time, which was *Anno* 872. the counties remained intire, but then divided into hundreds; for before that the earls who were *conſanguinei* of the king and of the royal blood

blood had the cuſtody thereof. This office continued in the earls till by reaſon of the great trouble, they were weary of it, and then were appointed *Vicecomites*, which continue to this day. This office was aſſiſted with inferior * juriſdictions, as view of frankpledge and turn, to take in- * P. 364.
rolment of the freeholders. The hundred court, &c. and theſe courts continued until *Edward* the ſecond's time, and then the king granted out of the turn the leet, and out of the hundred court a court baron. *Fitz. Leet* 11. *Br. Leet* 26. *Dyer* 13. *b.* 64. But notwithſtanding theſe courts were thus chipped out of the county, yet the juriſdiction of the county remained intire to the ſheriff, until afterwards the king granted ſome hundreds away in fee, and alſo franchiſes to ſeveral other perſons. And thereupon ſeveral ſtatutes were made to reſtrain the miſchiefs of ſuch grants, whereby inſufficient perſons were become owners of them, and managed them to the prejudice of the people, *viz.* 9 *E.* 2. the ſtatute of *Lincoln*, which injoins, that the ſheriffs have ſufficient in the county to anſwer the king; and ſo of farmers of hundreds, and that executions ſhall be made by bailiffs of hundreds: So 2 *E.* 3. *cap.* 4. and 5. But thoſe ſtatutes did not remedy the inconvenience, for the crown did grant bailiwicks in fee, and thereupon were the acts of 2 *E.* 3. *cap.* 12. and 14 *E.* 3. *cap.* 9. made, both which ſtatutes do forbid the granting more bailiwicks than were then granted.

As to the things granted they are five, and none of them grantable.

1. Courts. They are not grantable by the king, becauſe the turn is called the ſheriff's turn, 31 *E.* 3. *cap.* 15. and ſo *Paſch.* 6 *H.* 7. 2. *pl.* 4. And the county court is the ſheriff's. 4 *Co.* 33. *a. Mitton*'s caſe.

2. Offices. The officers of theſe courts belong to the ſheriff. *Mitton*'s caſe, *Scrog*'s caſe, *Dyer* 175.

3. Fines and profits. They are the ſheriffs, 1 *E.* 3. they ſhall be delivered to the uſe of the ſheriff.

4. Bailiwicks. That is incident to the office of the ſheriff, and he ought to anſwer for him. *Dyer* 241. *a. pl.* 47.

5. Hundred. If the ſheriff ſhall not have it, he cannot anſwer for eſcapes there.

This very caſe reſolved, 2 *Car. Forteſcue*'s caſe, *Co.* 4. *Inſt.* 367.

Bigland contra. As to the caſe of *Mitton*, and other caſes, wherein certain offices incident to ſheriffs are alledged, they ſtand upon different reaſons from our caſe.

The king may except any part of the county from the power

power of the ſheriff. 1 *Roll. Rep.* 118. *Villa de Derby* verſus *Foxley*.

Of common right a hundred belongs to the king. 2 *Roll. Abr.* 73. *b.*

* P. 365. * As to the ſtatutes, That of 2 *E.* 3. *cap.* 12. extends only to ſuch hundreds as were let to farm by the then king, and the ſtatute of 14 *E.* 3. *cap.* 9. is relative to the other act, and ancient ſtatutes are conſtrued according to the ſubſequent uſage. *Et adjournatur.* And afterwards, *viz. Paſch.* 34 *Car.* 2. Judgment was given for the plaintiff.

Ambroſius Manaton's *Caſe*.

Mandamus. Trem. 450.

AMBROSIUS MANATON had a *Mandamus* directed to *Charles Luxon* mayor of the borough of *Trevena Buſeny* in the county of *Cornwal*, to be ſworn mayor there, according to an election made of him by the ſaid borough, to which writ the ſaid *Charles Luxon* returns, that before the coming of the writ, and before the iſſuing out thereof, *viz.* 25 *Octob.* 31 *Car.* 2. he the ſaid *Charles* was removed from the place of mayor, and one *William Amy* then choſe, admitted and ſworn, and from that time *hucuſque fuit & adhuc eſt Major Burgi prædicti*, and by reaſon of his ſaid office hath the cuſtody of the common ſeal, and thereupon he the ſaid *Charles* could not reſtore him, as the writ requires; And whether this was a good return was the queſtion? And the objection is, becauſe it is not returned, that the new mayor *Amy* was *debito modo electus*, and it may be that he was choſe out of time, and not according to charter. 2. Returns muſt be certain, and not by implication, becauſe the party outed hath not liberty to reply to them; and of this opinion were my brother *Dolben* and myſelf; but *Scrogs* chief juſtice, and *Jones* juſtice *contra*, That when *Amy* is returned, he ſhall be intended *debito modo electus*; and if an action upon the caſe ſhall be brought for this falſe return, and the iſſue be elected or not; if he was not duly elected, it will go for the plaintiff in the action; as *Co. Lit.* 381. Fines levied, is intended lawfully levied, *Weſtm.* 2. *cap.* 5. *Ita quod Epiſcopus Eccleſiam conferat, i. e. legitime conferat. Non præſtat impedimentum quod de jure non ſortitur effectum.* But I do conceive, and was then of opinion, that the return is not good, becauſe only by implication. As the caſe of the recorder of *Barnſtable*, *Paſch.* 18 *Car.* 2. *B. R.* The return was, *Non conſtat nobis*, that he was ever elected; and adjudged inſufficient. *Vide antea.* And theſe

places

places do concern the publick government, and we ought not to favour falſe returns; and if we ſuſpect a return to be falſe, this court can make a corporation * ſwear the return; but by reaſon the court was divided no writ went. * P. 366.

Conſtance Harvey *Widow of* Henry Harvey, Demandant, *verſus* Francis Harvey. *In Dower. In* C. B.

THE tenant pleads, That after marriage the huſband had ſettled other lands upon the demandant for her life, for her jointure, and that ſhe after his death agreed thereto, and entered accordingly. The demandant replies, That it was a voluntary ſettlement of her huſband, and traverſes, that it was not for her jointure, and iſſue thereupon; and at the *Niſi Prius* the tenant made default, and a petty *Cape* awarded and returned, and judgment, that the demandant have ſeiſin; and the demandant ſuggeſts, that her huſband died ſeiſed, and prays a writ to enquire of the damages, returnable *Craſtin. Pur.* The ſheriff returned, that he hath delivered ſeiſin of the lands particularly; and alſo an inquiſition, which finds that the lands are worth 114*l.* 11*s. per annum*, and that her huſband had been dead ſix years and three quarters, and that ſhe had ſuſtained damages *occaſione detentionis dotis ultra valorem præd' & ultra miſas & cuſtag' ſua* 195*l & pro miſ. & cuſtag.* 20*s.* And upon this *Conſtance*, *gratis* releaſes the 195*l.* and demands judgment only for the 20*s.* And judgment is given, That the demandant recover *tam valorem tertiæ partis præd.* from the death of her huſband, which comes to 257*l.* and the 20*s.* and 11*l. de incremento*, in all 269*l.* and the tenant brings a writ of error, and aſſigns ſeveral things for error, which are made good upon diminution alledged, and there being a variance between the inquiſition and the writ of ſeiſin, the writ of ſeiſin and execution was erroneous, and thereupon a writ of enquiry, and the value of the land found; and now alledged, that here ought to be no writ of enquiry, becauſe the damages were releaſed by the demandant. But upon conſideration had of the record, the whole court reſolved, that the releaſe was only of the damages ſuſtained *occaſione detentionis dotis*, and not of the meſne profits of the land, for they are two diſtinct things, as appears by the precedents. *Co. Lit.* 32. *b. Belfield* verſus *Rous.* The writ is to enquire not only of the value of the lands, but alſo of the damages *ratione detentionis dotis*, and judgment accordingly.

Error. 2 Jon. 121. 2 Show. 61.

* P. 367. So is *Raſt. Entr.* 237. *Tit. Dower en* * *Judgment* 13. and ſo are all the judgments; and a *Fi. fa.* lies for the damages, *Formulæ bene placitandi* 223. And judgment was affirmed.

Sir Miles Stapleton's *Caſe.*

Court. SIR *Miles Stapleton* having been arraigned at the king's bench bar this laſt term for high treaſon, and a day appointed next term for his trial; the proſecutor, one *Boldron*, ſuggeſted to the lords of the privy council, that his wife, who he ſaid was a material witneſs, was in expectation of being brought to bed every day, and ſo ſhe could not be at the trial, and therefore deſired the priſoner might be tried in the country; and thereupon the lords of the council ordered, that the judges of the king's bench ſhould be attended, and to conſider whether the indictment may be ſent down into *Yorkſhire* to be tried there next aſſizes by *Niſi Prius*, and whether a *Tales* is grantable in caſe of high treaſon; whereupon Mr. Attorney general attended at my brother *Jones*'s chamber, where my brother *Dolben* and I diſcourſed together concerning this matter, my lord chief juſtice being out of town, and we did reſolve, 1. That an indictment of high treaſon may be tried by *Niſi Prius*, for ſo is *Co.* 4 *Inſt.* 73. and the ſtatute of 14 *H.* 6. *cap.* 1. gives power to the judges of *Niſi Prius* to give judgment, and award execution in caſes of felony and treaſon, which cannot be but where ſuch offences are tried by *Niſi Prius*, for *quatenus* judges of *Niſi Prius* they cannot give judgment in caſes not legally coming before them. As for felony and murder, indictments removed into the king's bench concerning theſe offences, may be ſent down to be determined by virtue of 6 *H.* 8. *cap.* 6. but that ſtatute extends not to treaſon. 2. We reſolved, That a *Tales de circumſtantibus* may be awarded in caſe of treaſon, by the ſtatute of 4 and 5 *Ph.* and *Mar. cap.* 7. where the king is party. And ſo we left it to Mr. Attorney to do as he ſhall ſee cauſe, with the priſoner.

* P. 368. * William Muſchamp and others, Plaintiffs, *verſus* Henry Aſton, Defendant. *Error, Ireland.*

Duties. THE plaintiff below declares that he was poſſeſſed of two hundred twenty-ſix hundred and an half of lambſkins,

ſkins, and intended to tranſport them from the port of the city of *Dublin* to *England*, and for the exportation of the ſame ſkins had paid tonnage and poundage, according to an act of parliament made at *Dublin* 4 *March* 14 *Car.* 2. *viz.* *For every hundred* 10*d.* The defendant *vi & armis* did aſſault the plaintiff, and hindered him from exporting the ſaid ſkins till he had paid 84*l.* 8*s.* 11*d.* over and above the ſaid duty of 10*d.* *per cent. ad damnum* 200*l.* The defendants plead Not guilty to all, but the hinderance of the exportation till payment of the 84*l.* 8*s.* 11*d.* and as to that they ſay, That by the ſame act it is enacted, *That every one exporting Iriſh wool out of the kingdom of* Ireland *ſhall pay to the king upon the exportation thereof, for every ſtone containing* 18lb. 1s. 8d. That 8 *April* 1676. the king by indenture granted the duty to the defendant, *Habend.* from *Chriſtmas* 1675. till *Chriſtmas* 1682. That there was upon the ſaid ſkins 1351 ſtone, and 7-eighths of a ſtone of wool of ſix months growth, and that 84*l.* 8*s.* 11*d.* was due for the ſame; and for not payment a ſeizure *prout*. The plaintiff demurred. This action was originally brought in the Common Pleas in *Ireland*, and judgment there given for the plaintiff; and upon a writ of error in *B. R.* in *Ireland*, that judgment affirmed; and now the defendants have brought this writ; and upon debate, whether the duty ſhould be paid both for the ſkins and the wool ſeparately and diſtinctly, We all reſolved, That there ſhall be but only one duty paid, *viz.* for the ſkins; for it cannot be preſumed, that men will kill the lambs barely to deprive the king of his cuſtoms; and by the act of parliament,

	l.	*s.*	*d.*
Sheep-ſkins tawed with the wool on, an hundred	1	10	0
Pelts dreſt or undreſt, without the wool, an hundred	1	0	0
Sheep-ſkins with the wool, the hundred	1	0	0
Lamb-ſkins dreſt or undreſt, the hundred	0	16	8

By which it appears that lamb-ſkins are to contain the wool on them; and it is not uſual in many places to ſhear lambs, and therefore judgment was affirmed. *Per tot Cur'.*

Witneſs.

THE firſt day of this term *Elizabeth Celier*, the wife of *Peter Celier*, was tried at the bar upon an indictment, for *That ſhe, with others unknown*, 1 November 31 Car. 2. *did compaſs and intend the death of the KING, to change the* government, *and extirpate the* Proteſtant religion, *and to that purpoſe did meet and adviſe together, and did contribute, pay and diſburſe great ſums of money; and for better concealing of the treaſons aforeſaid, did diſburſe great ſums of money to divers perſons to lay and charge the treaſons upon other perſons.* Upon not guilty pleaded, ſhe was found not guilty. There was one perſon who came againſt her as a witneſs, who was the then proſecutor, *Thomas Dangerfield*, againſt whoſe evidence the priſoner excepted, for that he had been ſeveral times convicted of cheating, and had been ſet upon the pillory, and had been whipped, and was of very little credit, and then would have produced a pardon of theſe offences; but ſhe produced a copy of a conviction of a felony, for which he was burnt in the hand, which was out of that pardon; and alſo an outlawry for another felony, which was likewiſe out of that pardon; and ſo his teſtimony was ſet aſide. And it was debated, That admit a witneſs be convicted of felony, and afterwards pardoned, whether he ſhall thereby be reſtored to be a good witneſs? and my lord chief juſtice *Scrogs* and myſelf were of opinion, That he could not, becauſe the pardon doth take away the puniſhment due to the offence, but cannot reſtore the perſon to his reputation; and of that opinion was juſtice *Nichols* in *Cuddington* and *Wilkins*'s caſe, *Moor* 872. *pl.* 1213. But my brother *Jones* and *Dolben contra*; and ſo afterwards did I conceive; for in the caſe of *Cuddington* and *Wilkins*, as 'tis reported in *Hobart*, 'tis ſaid, That the pardon takes away not only *pœnam*, but *reatum*. Another queſtion was ſtarted, *viz.* Whether a man convicted and burned in the hand be ſtigmatique as to his teſtimony? And *Jones* held
* P. 370. that he was not, becauſe the burning of the hand * is no part of his judgment, and is by 4 *H.* 7. *cap.* 13. only to notify

notify to the judge that he hath had his clergy before, 5 *Co.* 50. *a. Biggins*'s caſe. But I have examined that caſe, and do find that no judgment was given therein, but compounded, as 'tis reported both by 3 *Cro.* 682. and by *Moor* 571. *pl.* 782. And *Cro.* ſays, there were two judges againſt two; and *Moor* ſays, 'twas agreed, the king could not pardon the burning of the hand in an appeal. And in truth it ſeems to me to be part of the judgment; for the entry is, *Ideo conſideratum eſt, quod le offender cauterizetur in manu ſua læva. Raſt. Entr.* 1. *b.* and 56. *a.* But upon the whole matter it appears by *Heſton*'s caſe, cited in *Foxley*'s caſe, 5 *Co.* 110. *a.* That the burning in the hand is (by virtue of 18 *Eliz. cap.* 6. which ſays he ſhall be forthwith enlarged) in nature of a pardon, and the priſoner is thereby cleared from the offence, and conſequently he is a good witneſs, and not ſtigmatique. *Hob.* 292. *Searl* verſus *Williams.*

Thomas Hunt *verſus* William Danvers. *Aſſumpſit. Error in* C. B.

THE plaintiff in *C. B.* declares, That there was a diſ- Aſſumpſit.
courſe between him and the defendant concerning a portion of tithes in the pariſh of *Banbury*, and of the rectory of *Banbury*, and concerning divers controverſies concerning the ſame, and concerning a verdict for 18*l.* againſt one *Henry Taſker* for the tithe of *Berrymore-Mead* obtained by the plaintiff; and thereupon the defendant, in conſideration that the plaintiff at the requeſt of the defendant would acquit the ſaid *Henry Taſker* from the ſaid 18*l.* & *acquietaret omnes alios occupatores* of the lands called *Crench*, *Berrymore-Mead*, *Burdens*, *Gabereſſes*, *Little Fullarke*, *Great Fullarke*, *Caſtlemead*, &c. from all arrears of tithes then unpaid to the plaintiff, and permit the defendant then to receive of the then occupiers of the aforeſaid lands, the tithe of hay growing upon the ſaid lands, which then had not been received by the plaintiff, did promiſe,

1. To allow the tithe of hay of the ſaid cloſes to be the right of the plaintiff, and clearly to belong to the ſaid portion of tithes.

* 2. That the plaintiff from thence-forward ſhould qui- * P. 371.
etly receive all tithes of the ſaid cloſes without any interruption or moleſtation.

3. That he would ſeal a writing purporting a diſclaimer of

of the defendant and his truſtees of the tithes of the ſaid cloſes.

The plaintiff in fact ſays, That he hath done all on his part, and aſſigns for breath, that the defendant did not permit the plaintiff to receive the tithes of the ſaid cloſes without interruption and moleſtation; but *Term Mich.* 26 *Car.* 2. did proſecute two ſuits in the Exchequer chamber, *ad damnum* 300*l.* Upon *Non Aſſumpſit* pleaded, and verdict and judgment for the plaintiff, the defendant brings a writ of error, and aſſigns the general error. The ſole queſtion propoſed by *Holt* of counſel with *Hunt*, the plaintiff in the writ of error, was, Whether a ſuit in equity be a breach of the agreement, ſuch as the common law can take notice of? and relied upon 3 *Leon.* 72.

And I have conſidered that book, and others, and do conceive ſuch ſuit is a diſturbance; for, 1. *Ex vi termini*, when a man is in poſſeſſion, to be *ſubpœnaed* to appear in chancery is a diſturbance. And this ſuit ariſes by reaſon of theſe tithes, 1 *And.* 137. *pl.* 188. *Burr* verſus *Higgs*. Debt upon an obligation, conditioned to permit the plaintiff quietly to take, reap and carry away corn. The defendant pleads *quod permiſit*. The plaintiff replies that he came and forbid him to reap; and adjudged a breach of the condition. *Mich.* 47 *E.* 3. 22. *a. pl.* 51. In an aſſiſe between two tenants in common, a forbidding by word of mouth to the tenant to pay his rent was adjudged a diſſeiſin.

True it is, that *Selby* and *Chute*'s caſe is, That a ſuit in chancery is no diſturbance, as 'tis reported by *Moor* 859. *pl.* 1179. 1 *Roll. Abr.* 430. *pl.* 15. 1 *Brownl.* 23. But by the record itſelf, *Winch Intr.* 116. it appears that judgment was given for the plaintiff, and *Winch* was one of the judges that gave the judgment; for this was 11 *Jac.* and he was made judge 9 *Jac.* and ſo he ſhould know better than any of thoſe who report the caſe, none of which then attended the court of *C. B.* but *Brownlow*; and this judgment is entered not in his, but in *Waller*'s office.

As to the caſe cited at the bar, 3 *Leon.* 71. The ſuit was there againſt the leſſor by a ſtranger; and ſo the leſſee could not be diſturbed thereby. And I take ſuch a ſuit not to be a breach of covenant againſt incumbrances, becauſe a
* P. 372. * decree is no incumbrance upon the land, but 'tis a moleſtation to the perſon. And the law doth take notice of ſuits in chancery; for a forbearance to ſue in chancery is a good conſideration to ground an *Aſſumpſit*, 3 *Cro.* 768. *Dowdeney* verſus *Oland*, by the courts of *C. B.* and *B. R.* and ſo is 3 *Cro.* 847. *Coulſton* verſus *Carr*. And of this opinion were the

the other three judges; but my brother *Dolben* found a flaw in the assignment of the breach of the promise; and so it was adjourned.

Viscount Clare *versus* Linch. *Error. Ireland.*

AN ejectment for lands in the county of *Clare*, of the demise of *Peter Cransborough* for ten years. Upon Not guilty pleaded, issue was joined, and then there is an entry upon the roll thus: Trial.

Et super hoc pro indifferenti triatione exit' præd' inter partes præd' superius junct' habend' eædem partes ex eorum unanimi consensu & assensu, & ex assensu & consensu eorum Consilii & Attorn' in Cur' Domini Regis coram ipso Rege hic scilicet apud the King's Court prædict' petunt Breve Domini Regis Vic' Com' Corke dirigend' de Venire faciend' coram dicto Domino Rege hic &c. duodecim, &c. de Corpore Com' sui ad triand' exit' præd'. Et quia videtur Cur' hic quod petitio ill' est rationi consona, Ideo præcept' est Vic' Com' Corke præd' quod Venire fac' coram Domino Rege hic scilicet apud the King's Court die Martis proximo post Octab' Pur' Beatæ Mariæ Virginis duodecim, &c. de Corpore Com' sui per quos &c. qui nec, &c.

Then there is a *Nisi prius* granted to the said county of *Corke*, and the cause there tried, and a bill of exceptions put in, and upon debate in *B. R.* in *Ireland*, judgment was given for *Linch*; and now the lord viscount *Clare* brings a writ of error, and assigns the general error; and the question now debated was, Whether consent can make this trial, had in a foreign county, good, contrary to *Crow* and *Edward*'s case, *Hob.* 5.

And we all resolved that the trial was well had; for the case in *Pasch.* 44 *E.* 3. 6. *b. pl.* 2. is as strong a case, where villenage was tried where the lands lay, and not where the action was brought, as it ought to be by law, but consent made it good, *Vide Dormer*'s case, 5 *Co.* where consent shall make good what otherwise would not be so. And *Crow* and * *Edwardi*'s case, the consent was entered on record, as 'tis in this case. And so judgment was affirmed, in the point resolved 2 *Roll. Rep.* 166. *Macduncoh* versus *Stafford*, *Palmer* 100. 2 *Roll. Rep.* 363. *Lloyd* versus *Williams*. * P. 373.

Topham

Topham *verſus* Pannel.

Condition.

DEBT for 20 *l.* upon condition that *Anne Maſon alias Fawne*, ſhall pay 7 *l.* 9 *s.* 4 *d.* ſuch a day to the plaintiff, or perſonally appear 23 *Jan.* inſtant, in the houſe of *William Barnſley*, eſq preciſely at ten o'clock in the morning. The defendant pleads, that the ſaid *Anne Maſon* upon the ſaid 23 *d* day of *January*, and diverſe days as well before as after, *ex viſitatione Dei ægrota fuit, & ſub quodam morbo ex viſitatione præd' tant' laboravit, quod eadem Anna totaliter inhabilis ad comparend' ſuper eundem viceſimum tertiam diem Januarii in præd' domo præfat' Willielmi Barneſley devenit, ſcilicet apud, &c. Et hoc, &c.* The plaintiff demurs.

And firſt, the court ſeemed to agree that the plea as to the ſickneſs was good, notwithſtanding *Co. Lit.* 259. *b.* 1 *Anderſ.* 32. *pl.* 79. and *Bro. Saver default* 45 and 48 *Abridgment de Aſſiſe* 55. *a.* and which is allowed an excuſe in outlawry for felony, *Fitz. Challenge* 153. For 'tis not barely ſhe was ſick, &c. but *ex viſitatione Dei ægrota fuit, & totaliter inhabilis ad comparend, &c.*

But 2*dly*. They reſolved, that though the condition be in the disjunctive, and one part is impoſſible, yet that the other ought to be performed, as the caſe is, becauſe to be done by a ſtranger; and my brother *Dolben* urged, that the reaſon given by the lord *Coke*, was not needful in that caſe; and by that reaſon there given, if I ſell my land, and deſire the purchaſer to pay the money down, and I will either make him an aſſurance, or pay the money; if I die, the money would be loſt. And judgment was given for the plaintiff; for this reaſon chiefly, that the appearance was to be by a ſtranger, and not by the obligor himſelf.

* P. 374. * Dominus Rex *verſus* Honora Munſon & alios. *Error. Aſſiſes at* Hereford.

Oath.

THE defendants were indicted for refuſing the oath of obedience injoined by 3 *Jac. cap.* 4. and the indictment was, that at the aſſiſes and general gaol-delivery held before Sir *Robert Atkins, &c.* and *Zachary Babington*, gent. *eidem Roberto Atkins* and *Timotheo Littleton, &c. hac vice aſſociat. per ſacramentum ſuum, &c. præſentat. exiſtit modo ſequen. viz. Jur. pro Domino Rege præſentant quod*, at the general quarter-ſeſſions for the county of *Hereford*, 14 *January* 30. the juſtices of peace did tender the ſaid oath to the defendants,

fendants, and they refuſed, and that afterwards *ad Aſſiſas tent. pro Com. Hereford præd.* 31 *Martii* 31 *Car.* 2. *Coram Roberto Atkins Milite Balnei un. Juſtic. dicti Domini Regis de Banco & Zacharia Babington Gen. eidem Roberto Atkins & Timotheo Littleton Mil. un. Baron. Scaccarii dicti Domini Regis ad Aſſiſas in Com. Hereford præd. capiend. aſſign. per formam Statut.* the ſaid juſtices *Atkins* and *Zachary Babington* again tendered the ſaid oath, and they refuſed to take the ſame; and upon not guilty pleaded, the defendants afterwards, *relicta verificatione*, confeſs the indictment; and judgment is given, that the defendants *ponantur & quilibet eorum ponatur extra protection. dicti Domini Regis, & quod forisfaciant & quilibet eorum forisfaciat dicto Domino Regi omnia bona & catalla terras & tenementa ſua*, and that they *committantur & quilibet eorum committatur Gaolæ dicti Domini Regis in Com. Hereford præd. ibidem remanſur. duran. beneplacito dicti Domini Regis*, &c. Upon the writ of error, the error aſſigned was, that the ſecond tender of the oath was by the juſtices of aſſiſe only. Whereas the ſtatute of 3 *Jac.* ſays, it muſt be by the juſtices of aſſiſe and gaol-delivery, and this error ſeemed not to be allowed by my brother *Dolben*, but by the other two it was not ſpoke to. But I conceive 'tis error, and that the juſtices of aſſiſe cannot, by virtue of that commiſſion barely, tender the ſaid oath; for the ſtatute ſays, that in caſe they ſhall refuſe to take the ſaid oath tendered them by the juſtices of peace, then the ſaid juſtices ſhall and may commit the ſame perſons to the common gaol, there to remain without bail * or mainprize, until the next aſſiſes, where the ſaid oath ſhall be again in the ſaid open aſſiſes required of them by the ſaid juſtices of aſſiſe and gaol-delivery in their open aſſiſes, every perſon ſo refuſing ſhall incur the danger and penalty of *Præmunire*; by which it appears, that they being committed to gaol by judgment of the juſtices of peace, none can deliver them but they who have power to deliver the gaol. And though the ſtatute *de Finibus*, 27 *E.* 1. gives juſtices of aſſiſe power to deliver the gaol, that is intended only of felons, as appears by *Stamf. Pla. Cor.* 57 and 58. But the judgment was reverſed for another error incurable, for miſreciting the oath contained in the act; for whereas the oath in the act is, *and him and them will defend to the uttermoſt of my power againſt all conſpiracy and attempts whatſoever*, the indictment is, *againſt all conſpiracies and contempts whatſoever.*

* P. 375.

Dominus

Dominus Rex *versus* Pemlington. *Error. Chester*

Error.

THE indictment was for entering into the close of one Crew, and he was found guilty, and judgment, and fined 12*d.* and the error assigned is, because the first process is a *capias*; whereas in all indictments for trespass and under felony, a *venire facias* is the first process. And judgment was for this cause reversed.

Doddesworth, &c. *versus* Anderson.

Bankrupt, 1 Danv. Abr. 686. p. 1. 2 Jones 141.

THE case was upon a special promise. The question between the plaintiffs and defendant was, whether *William Grice* was a bankrupt before a conveyance by him made to the defendant and *Mary* his wife, dated 23 *Septem.* 23 *Car.* 2. And the jury find a special verdict.

That the said *William Grice* was a subject born of the king of *England*, and lived at *Dublin* in *Ireland*.

That before the making of the said conveyance he traded as a merchant at *Dublin*, and got his living by buying and selling.

That he frequently came into *England* and bought goods there, and sold them in *Ireland*, and became indebted to divers persons in divers sums of money as yet unpaid, exceeding 100 *l.*

* P. 376. * That he once did sell in *England* a parcel of neats tongues, and at another time in *Ireland* did sell a parcel of tallow to be delivered at *Chester* in *England*, which was done accordingly.

That he left his house and trade in *Dublin*, and there absconded from his creditors.

That he afterwards sojourned with a friend in *England*, and gave order to be denied, and absconded from his creditors in *England* before the making of the said conveyance.

That the said conveyance was made *bona fide*, and for valuable consideration, 23 *Octob.* 23 *Car.* 2. but dated 23 *Sept.* 25 *Car.* 2.

And upon this verdict we resolved, that *Grice* was a bankrupt before the conveyance; for though he is found to buy and sell but once in *England*, it is not necessary that he do so, for many merchants do only buy beyond sea and sell here, and others do only buy here and sell beyond sea; for 'tis trading that makes a person capable of being a bankrupt, and

and 'tis plain that *Grice* did trade in *England*. And judgment was given accordingly.

Memorandum, June 18, 1680. Mr. *Nathaniel Redding* having been convicted (before juſtices of oyer and terminer by virtue of a ſpecial commiſſion for that purpoſe granted) for endeavouring to perſuade *Bedlow*, who was a witneſs againſt the noblemen impriſoned in the tower of *London*, to forbear his proſecution of them; and he the ſaid Mr. *Redding* having had judgment executed upon him by being ſet in the pillory, and fined 1000 *l.* and impriſoned for the ſame, but his fine ſince pardoned by the king, came this day into court, and demanded that an information which he there brought in his hand might be received by Mr. *Aſtrey* againſt the commiſſioners who condemned him, of which my brother *Jones* and brother *Dolben* were two, and that the information may be filed. But the court did declare that he was in a wrong way to exhibit any information in this manner, and did cauſe his words, whereby he did accuſe the two judges of oppreſſion, to be recorded; and for thoſe words, and for that he was infamous by having been on the pillory, the gentlemen at the bar did pray that his gown might be pulled over his ears (he having been formerly a practiſer at the bar) which was ordered and executed in court, and he was alſo condemned in court to pay the king 500*l.* and to lie in priſon till he paid it. He ſeemed to complain much for not being allowed a writ of error to reverſe * his judgment before the commiſſioners; and afterwards the laſt day of this term he petitioned to be ſpared his fine, and therefore the court did remit his fine and impriſonment, and only took a recognizance of him for his good behaviour; for that during the term ſuch power remains in the judges. *Co. Lit* 260. *a.* *(a)*

* P. 377.

(a) In this caſe one Marſhal's caſe was cited, who was fined 1500*l.* & afterwards in the ſame term reduced to 500 *l.* And though it be ſaid, 1 Cr. 251. in Sir James Wingfield's caſe, that fines aſſeſſed in court by judgment upon an information cannot be afterwards qualified or mitigated, it is meant in another term, and not in the ſame term.

Dominus Rex *verſus* Ocullean. *Middleſex.*

Prieſt.

AN indictment, that the defendant born within the king's dominions, being a prieſt, and ordained by authority from the ſee of *Rome*, 28 *Febr.* 31 *Car.* 2. *infra hoc Regnum Angliæ, ſcilicet* at the pariſh of S. *Margaret's Weſtminſter, proditorie & ut falſus proditor dicti Domini Regis nunc fuit & remanſit contra formam ſtatut. in hujuſmodi caſu edit.*

edit. & provis. Et contra pacem, &c. upon not guilty, the jury find a special verdict.

That the said defendant was born in *Ireland*, within the king's dominions.

That he is *facerdos factus & ordinat. per authoritat.* derived from the see of *Rome* before 28 *Febr.* 31 *Car.* 2.

That on the said 28 *Febr.* 31 *Car.* 2. the defendant in a certain ship sailing from *Bourdeaux*, in the dominion of the king of *France*, towards *Corke* in *Ireland* by tempest *coactus fuit, Anglicæ* was driven, into *Minehead* in *Somersetshire*, and there immediately *pro alta proditione præd. capt. & apprehensus fuit. Sed utrum super tota materia* the defendant be guilty or no, *petunt advisamentum Cur.* And I conceive upon this verdict, the defendant is not guilty, for these reasons.

1. From the preamble of the act of 27 *Eliz. cap.* 2. which says, *that whereas divers persons called jesuits, seminary priests, and other priests, have of late years come and been sent, and daily do come and are sent into* England *to withdraw the subjects from their obedience*, &c. Now this man neither came nor was sent, properly speaking, but *coactus fuit* into *Minehead.*

2. The clause which prohibits priests to come into or remain, reaches not here, because it is said that he was,
P. 378. * immediately after his being driven a-shore, taken, and so cannot be said to remain.

3. There is the act of God in the case, which is *summa necessitas*, of which all laws, both human and divine, allow. And in this act it is said in the clause, which injoins priests to depart, if the wind, weather and passage shall serve for the same; and so the clause which preserves liberty, who cannot go for infirmity.

4. *Actus non facit reum, nisi mens sit rea.*

As to that clause in the indictment, *that he was going into the king's dominions*, viz. *Ireland.*

Resp. Nil efficit conatus, nisi sortitur effectu. And with my opinion agreed the whole court. And judgment was given for the defendant.

Dominus Rex *versus* Alsop. *Derb. Error.*

Game. 3 Keb. 516.

THE defendant was indicted at the quarter-sessions, that he *non habens terras tenementa feod. annuitat. reddit. vel officia in jure suo proprio vel in jure uxor. ejus ad usum suum*

ſuum propr. nec aliqua alia perſona ſive aliquæ aliæ perſonæ ad uſum ipſius Thomæ vel uxor. ejus vel ad uſum eorum alterius annui valor. 100*l.* 9 *die Novemb.* 31 *Car.* 2. *apud Boylſtin Sagittavit in quodam tormento, Anglice vocat.* a Handgun, *contra formam Statut. in hujuſmodi caſu edit. & proviſ. ac contra pacem dicti D'ni Regis nunc Coron. & Dignitat. ſuas.* The defendant pleads not guilty, and found guilty; and judgment is entered thus: *Ideo conſideratum eſt per Cur. dicti D'ni Regis nunc hic quod præd. Thomas Alſop ſolvet dicto D'no Regi ſecund. formam Statut. in hujuſmodi caſu edit. & proviſ. decem librar. pro fine ſuo ſuper ipſum occaſione præd. impoſit. Et quod præd. Thomas Alſop capiatur ad ſatisfaciend. D'no Regi de fine præd', &c.* The defendant aſſigns the general error. But the errors inſiſted upon were theſe. 1. *Non habens terr.* refers to the time of the indictment, and not the ſhooting; and ſo he may have 100*l. per annum* when he did ſhoot, and may have parted with it at the time of the indictment, as 3 *Cro.* 754. *Stanſbie's* caſe. An indictment of forcible entry into lands *exiſten. liberum tenementum* of the party, is not good, for not ſaying *adtunc exiſten.* 2. The judgment is *ſolvet* for *ſolvat.* 3. *Decem librarum* for *decem libras*; and for theſe reaſons judgment was reverſed.

* *Sir* John Sparrow *verſus* Draper. *London.* * P. 379.

DEBT for rent. The defendant pleads in abatement, Repleader. *quod præd. Johannes Sparrow in billa præd. nominat. eſt & die exhibitionis billæ præd. fuit miles prout per billam præd. ſuperius ſupponitur Et hoc &c. unde petit judicium de billa &c.* The plaintiff replies, that the plaintiff is, and at the time of exhibiting the bill, was a knight, and tenders iſſue to be tried *per patriam.* The defendant demurs, becauſe this iſſue ought to be tried by the king at arms. But reſolved, that the iſſue ought to be tried *per patriam*; for *Co. Lit.* 74. *a.* ſays there are but ſix kinds of certificates, and this by the king at arms is none of them; and this iſſue is triable either by certificate or *per patriam.* And this very iſſue was tried *per patriam Mich.* 7 *H.* 16. 15. *a. pl.* 101. In *Qu. Imp.* The defendant pleads, that the plaintiff *apres le darreine Continuance* was knighted; and the plaintiff denies it, and iſſue thereupon, and tried *per patriam.* And judgment was in the principal caſe, that the defendant *reſpondeat ouſter.*

Dominus

Dominus Rex *verſus* Count de Caſtlemain.

Witneſs.

THE earl of *Caſtlemain* was indicted by the name of *Roger Palmer* eſq; earl of *Caſtlemain* in the kingdom of *Ireland*, for that he traiterouſly intending to kill the king, to introduce the Romiſh religion, and to ſubvert the government, 20 *June* 30 *Car.* 2. at the pariſh of St. *Giles in the fields*, together with other falſe traitors, did unite and gather themſelves together, and did conſult to put the king to death, to depoſe him from his crown and government, and to introduce the Romiſh religion, and to that purpoſe did promiſe great rewards; and pay divers ſums of money to divers perſons unknown; and that he did write divers notes in writing to incite divers other perſons to compleat the treaſons aforeſaid, *contra pacem & contra formam ſtatuti*. Upon not guilty pleaded, the defendant having been a priſoner in the tower for ſome time, was the twenty-third of *June* 1680. tried at the bar. There were only two witneſſes who offered materially to depoſe againſt him,

* P. 380.

and they * did depoſe very poſitively againſt him as to his attempting to procure ſome to kill the king, the witneſſes were doctor *Titus Oates*, and one *Thomas Dangerfield*. Upon the evidence of *Dangerfield*, who had been found guilty upon ſeveral indictments, one of felony, for which he had his clergy, and was burnt in the hand; upon other indictments he had been upon the pillory for cheating but had obtained his pardon under the great ſeal for all the ſaid offences; a queſtion did ariſe whether he might be a witneſs, and thereupon the priſoner did deſire to have counſel aſſigned him, and it was granted; and Mr. *Daniel*, one of his counſel, urged, that *Dangerfield* ought not to be a witneſs, for that he was blemiſhed, and the pardon had not reſtored him to his teſtimony; and cited 2 *Brownlow* 47. where it is ſaid that the king pardoned a man attaint, for giving a falſe verdict, yet he ſhall not be at another time impanelled upon any jury; for though the puniſhment were pardoned, yet the guilt remains. 2 *Bulſtr.* 154. *Brown* verſus *Craſhaw*. In a prohibition, the ſuggeſtion was proved only by two perſons attainted of felony. And *Coke* chief juſtice cited *Hill.* 11 *H.* 4. 41. *b. pl.* 7. That if a man be attainted of felony and pardoned, he ſhall not afterwards be ſworn upon a jury, becauſe he is not *probus & legalis homo*. But the court willing to be throughly ſatisfied,

ſent

ſent me to the court of common pleas to know their opinions in this point. And the judges there reſolved, That the burning of the hand was *quaſi* a ſtatute pardon, as to the felony; and as to that he was a good witneſs, and the pardon made him a good witneſs as to the other offences. But they ſaid, That had he not been burnt in the hand, the pardon would not have reſtored him to his credit again, becauſe in his teſtimony the people are concerned, and conſequently the pardon will not deprive them of their intereſt, and thereupon we allowed him to be a good witneſs; and with the opinion of the judges of the common pleas, as to the burning of the hand agree the books of 5 *Co.* 110. *a. Heſtop*'s caſe; and *Hob.* 292. and 67. *Cuddington* and *Wilkin*'s caſe; but *Moor* 872. ſays, that juſtice *Nicho's* was of opinion, That if the plaintiff had been convicted, the judgment would have been otherwiſe. And upon the whole evidence, the defendant was found Not guilty.

† *Memorandum*, The lord viſcount *Stafford*, upon a *Habeas Corpus* from the tower, deſired to be bailed, being impeached in parliament by the houſe of commons, and by reaſon thereof had lain in priſon in the tower almoſt two years; but we did reſolve, That a perſon accuſed of high treaſon, and not within the act for *Habeas Corpus's*, is not *de jure* to be bailed by this court, and we did not think fit in diſcretion to bail him; and we alledged likewiſe the orders of the houſe of lords, though we did not rely thereon, which are as followeth, *viz.* * P. 381. Bail.

Die Martis 11 *Martii* 167⅘.

It being moved, that this houſe would declare whether petitions of appeal which were preſented to this houſe in the laſt parliament be ſtill in force to be proceeded on, It is ordered by the lords ſpiritual and temporal in parliament aſſembled, that it be, and is hereby referred to the lords committees for privileges to conſider thereof, and report their opinion thereupon unto this houſe, and that the ſaid lords committees do meet on *Thurſday* next at three of the clock in the afternoon for that purpoſe.

Die Mercurii 12 *Martii* 167⅘.

The earl of *Shaftſbury* reported, That the committee appointed yeſterday to conſider in what ſtate the impeachments in the laſt parliament now ſtand, have peruſed the journal

journal of this houſe, and find that the fifth day of *December* 1678. the impeachments againſt the five lords now priſoners in the tower were brought from the houſe of commons, which conſiſted of a general charge of treaſon, and other high crimes. The houſe of commons declaring they would in convenient time exhibit the articles of their charge them. The next day this houſe appointed to go upon the conſideration of theſe impeachments, and all the judges were appointed to be then preſent, but nothing was done thereon.

The lords committees do alſo find that an impeachment of high treaſon, and other high crimes againſt *Thomas* earl of *Danby* lord treaſurer, was brought from the houſe of commons the twenty-third day of *December* 1678. and the particular articles then exhibited, and the commons deſired that he might be ſequeſtered from his place in parliament, and committed to ſafe cuſtody.

* P. 382. * That the lord treaſurer deſired copies of all papers and proceedings concerning this buſineſs, and that it was then reſolved upon the queſtion, that the lord treaſurer ſhould not then withdraw.

It farther appears, That on the twenty-ſixth of *December* 1678. the lord treaſurer moved the houſe for a copy of his charge, and that he might not lie long under it; whereupon it was moved that the houſe would conſider of the deſire of the houſe of commons concerning his confinement.

The debate was adjourned.

It appears that this houſe on the twenty-ſeventh of *December*, reſolved, That the lord treaſurer ſhould not now be confined; and ordered, That he ſhould have a copy of the articles, to which he was appointed to bring in his anſwer before the third day of *January*, and that he might have counſel to aſſiſt him.

Upon report made by the earl of *Shaftſbury* from the lords committees for examination of the late horrid conſpiracy concerning the impeachments brought up from the houſe of commons in the laſt parliament, how they ſtand entered in the journal of this houſe,

It is ordered, That it be, and is hereby referred to the lords committees for privileges, to conſider of the ſtate of the ſaid impeachments, and all the incidents relating thereunto, and report their opinion thereupon unto this houſe.

Die

Die Lunæ 17 *Martii* 167$\frac{8}{9}$.

Ordered by the lords ſpiritual and temporal in parliament aſſembled, That it be, and is hereby referred to the lords committees for privileges, to conſider whether petitions of appeal which were preſented to this houſe in the laſt parliament be ſtill in force to be proceeded on, as alſo to conſider of the ſtate of the impeachments brought up from the houſe of commons laſt parliament, and all the incidents relating thereunto, and make report thereof unto the houſe.

Die Martis 18 *Martii* 167$\frac{8}{9}$.

The earl of *Eſſex* reported, That the lords committees for privileges, in obedience to the order of this houſe dated the ſeventeenth of this inſtant *March*, have conſidered of the matters referred to them, whether petitions of appeals which * were preſented to this houſe in the laſt parliament be ſtill in force to be proceeded in; as alſo to conſider of the ſtate of the impeachment brought up from the houſe of commons laſt parliament, and all the incidents relating thereunto, and make report thereof unto the houſe; and their lordſhips upon peruſal of the judgment of this houſe, of the twenty-ninth of *March* 1673. are of opinion, That in all caſes of appeals and writs of error they continue, and are to be proceeded on *in ſtatu quo* as they ſtood at the diſſolution of the laſt parliament, without beginning *de novo*.

* P. 383.

The judgment and proceedings being large, are omitted to be reported, the journal of this houſe being ready, wherein that judgment is entered.

And upon conſideration had of the matter referred to their lordſhips concerning the ſtate of the impeachments brought up from the houſe of commons the laſt parliament, and all the incidents relating thereunto, their lordſhips find, that the five lords who are in the tower are upon general impeachments, and the other lord is impeached with ſpecial matter aſſigned, they refer the houſe to the report made the 12th of *March* inſtant, which ſtates what is entered in the journal of the laſt parliament concerning this matter; and their lordſhips are of opinion, That the diſſolution of the laſt parliament doth not alter the ſtate of the impeachments brought up by the commons in that parliament.

Die Mercurii 19 *Martii* 167$\frac{8}{9}$.

Next the houſe entered into conſideration of the report from the lords committees for privileges, whether petitions of appeal which were preſented the laſt parliament be ſtill in force to be proceeded in; and concerning the ſtate of impeachments brought from the houſe of commons the laſt parliament, and all the incidents relating thereunto; and in the midſt of the debate the earl of *Lincoln* came into the houſe, and took the oaths of allegiance and ſupremacy, and made and ſubſcribed the declaration in purſuance of the act for the more effectual preſerving the king's perſon and government by diſabling papiſts from ſitting in either houſe of parliament.

After this the houſe proceeded in the debate aforeſaid, and after ſome time ſpent therein, it was deſired that this queſtion might be put, Whether to agree with the committee in this * report? Then this preſent queſtion was put, Whether this queſtion ſhall be now put? And it was reſolved in the affirmative.

* P. 384.

Then the main queſtion was put, Whether to agree with the committee in this report? And it was reſolved in the affirmative.

The houſe this day taking into conſideration the report made from the lords committees for privileges, that in purſuance of the order of the ſeventeenth inſtant to them directed for conſidering whether petitions of appeal which were preſented to this houſe in the laſt parliament be ſtill in force to be proceeded on, and for conſidering of the ſtate of the impeachments brought up from the houſe of commons the laſt parliament, and all the incidents relating thereunto, upon which the lords committees were of opinion, That in all caſes of appeals and writs of error they continue and are to be proceeded on *in ſtatu quo*, as they ſtood at the diſſolution of the laſt parliament, without being *de novo*, and that the diſſolution of the laſt parliament doth not alter the ſtate of the impeachments brought up by the commons in that parliament. After ſome time ſpent in conſideration thereof,

It is reſolved by the lords ſpiritual and temporal in parliament aſſembled, That this houſe agrees with the lords committees in the ſaid report.

Dominus

Dominus Rex *verſus* The Inhabitants of the County of Eſſex.

AN information for not repairing a certain common ſtone-bridge commonly called *Daggenham Bridge*, alias *Daggenham Beam*, ſituate lying and being in *ſeparalibus Parochiis de Hornechurch & Daggenham* in the ſame county in *Communi alta Regia via ducen' a Paroch. de Raynham in Com. præd. uſq; Paroch. de Daggenham præd. in Com. præd. & ſic verſ Civitat London.* The defendants plead, That they ought to be charged with the repairing of the ſaid bridge, for that by an inquiſition taken at *Chelmesford* 3 *Aug.* 26 *Car.* 2. before ſir *Matthew Hale* knight, chief juſtice of *B. R.* and juſtice *Twiſden* and others, juſtices of oyer and terminer, it was preſented, That a certain common bridge commonly called *Daggenham-Beam, jacen. & exiſten. in Parochia de Daggenham in Com. Eſſex præd. in communi alta Regia via ibidem ducen. a Daggenham præd. in Com. præd. ad Vill. de Raynham in eodem* * *Com.* was then in decay and out of repair, and that ſir *Norton Knatchbull*, bart. and ſir *Thomas Fanſhaw*, knt. by reaſon of the tenure of lands in the pariſh of *Barking*, and elſewhere in the ſaid county, late the lands of the abbeſs of the abbey of *Barking*, ought to repair the ſame, and thereupon a *Venire fac'* iſſued againſt the ſaid ſir *Norton* and ſir *Thomas*; and 10 *July* 28 *Car.* 2. before juſtice *Jones* and other commiſſioners of *oyer* and *terminer*, and the ſaid ſir *Thomas* came and pleaded that he ought not to repair the ſaid bridge by reaſon of the ſaid tenure, but that the inhabitants of *Daggenham* ought to repair the ſame, and thereupon a trial was had 12 *March* 29 *Car.* 2. and found that the ſaid ſir *Thomas* ought to repair the ſaid bridge *modo & forma prout*, &c. and judgment againſt him to the king for 20*l.* and then avers that this and that are the ſame bridge, and that the ſaid judgment continues ſtill in force, and not reverſed; and upon this plea the king's attorney demurred, becauſe the bridge contained in the information is in two pariſhes, and the bridge in the plea lies but in one, and ſo cannot be the ſame; and ſo was the opinion of the court, for ſir *Thomas Fanſhaw* may be tied to repair ſo much of the bridge as is in *Daggenham*, and the country the other part. And judgment was given for the king.

Ways. Trem. 205.

* P. 385

Dominus Rex *verſus* John Biſhop, *Civitas Oxon.*

Trade. THE defendant is indicted before the juſtices of peace of the city of *Oxon* by the name of *John Biſhop de Civitate Oxon præd. Millener* 5 *October* 29 *Car.* 2. *& multis aliis diebus & vicibus continue poſt præd. quintum diem Octobris* for three months and more, *viz.* to the taking of the inquiſition, did uſe, exerciſe and occupy unlawfully, *& pro lucro ſuo propr. artem myſterium ſive manualem occupation. venditoris, Anglice of a Saleſman, exiſten. artem myſterium ſive manual. occupation. uſitat. infra hoc Regnum Angliæ* 12 *die Januarii* 5 *El. eodem Johanne Biſhop nunquam exiſten. in dicta arte myſterio ſive manuali occupation. educat.* as an apprentice for the ſpace of ſeven years. Upon a demurrer to the indictment, the ſole queſtion was, Whether a ſaleſman was within the ſtatute of 5 *Eliz.* becauſe it ſeemed to be a new trade. But reſolved it was a trade then uſed, and ſo within the ſtatute.

P. 386. * Dominus Rex *verſus* William Tempeſt & auters. *Dunelm.*

Error. TEMPEST, *Scot*, and others were convicted of a riot in the county of *Durham*, upon the view of *John Morland* and *William Blackſton*, eſqs; two juſtices of peace, and *Nicholas Conyers*, eſq; ſheriff of the ſaid county, of a riot, *contra formam Statuti de* 13 *H.* 4. *cap.* 7. and they were fined by the juſtices, *viz. Tempeſt* 20*l.* and the reſt 5*l.* apiece, but the ſheriffs did not join in ſetting the fine; and the defendants bring a writ of error, and aſſign for errors, 1. It doth not appear that the defendants were convicted by the view of the juſtices. 2. The ſheriff did not join in the fining them; and the ſtatute ſays, That the ſheriff is to be joined with the juſtices in the whole proceeding; and for theſe errors the judgment was reverſed.

Woodroffe *verſus* Margaret Wilgreſs.

Ley Gager. DEBT for 4*l.* recovered in a court-baron for damages and coſts recovered in a court-baron, in an action brought there for words. The defendant offered to wage her law, and came to the bar, and brought her compurgators with her, and ſhe was ready to ſwear, and ſhe laid her hand on the book, and began to ſwear; but upon the court's

court's demanding what the cauſe of action was, and finding it to be aforeſaid, we aſked her if ſhe had paid the monies recovered, and ſhe anſwered, that ſhe owed the plaintiff nothing; but ſhe not affirming that ſhe had paid it, and it being an apparent debt by the recovery, we aſked ſome of the compurgators whether they believed ſhe would ſwear true in this caſe? And they believing ſhe could not, we deferred taking her oath till next day, and then ſhe offered to pay the money, ſo as ſhe might be abated the coſts. And it ſeemed clear, that though wager of law doth lie of a debt recovered in a court-baron, yet that ſhall be intended of a debt originally ſued for there; *tamen Quære*, for I am in doubt how that will differ from the caſe at bar, only in the caſe at bar wager of law would not have been upon the original action, becauſe there is an injury ſuppoſed in the * defendant, in which caſe wager of law lies not, *Co.* 295. *a.* and therefore though it be in a recovery in a court baron, yet becauſe the original cauſe of the action will not permit *Ley Gage*, I think we did well in refuſing her waging of law. *Vide March* 15. *pl.* 35. *Moor* 276. *pl.* 430.

* P. 387.

Philip Brogan *verſus* John Aunger, Clerk. *Error* in *Ireland. Attachment upon a Prohibition.*

Intr. Hill. 30 & 31 *Car.* 2.

THE plaintiff declares, That one *Cornelius Duffe*, late prior of the hoſpital of St. *John's* by *Kells* in the county of *Meath*, 1 *January* 33 *H.* 8. being ſeiſed of the ſaid hoſpital and priory, and of the rectory impropriate of the parochial church of *Durvagh*, alias *Darvy*, in the counties of *Meath* and *Cavan*, and of the tithes of the eleven pole lands of *Bally-Bruiſe* lying in the pariſh of *Darvy*, and of all tithes in the ſaid pariſh in fee, that he and all his predeceſſors, *&c.* had and received time out of mind, for the uſe of the ſaid hoſpital, tithes of the ſaid lands called *Bally-Bruiſe*, within the ſaid pariſh of *Darvy*, That all the ſaid hoſpital and rectory came to king *Henry* the eighth, by a ſtatute made in *Ireland*, 15 *Febr.* 33 *H.* 8. *cap.* 5. and from king *Henry* the eighth they deſcended to *Edward* the ſixth, from him to queen *Mary*, from her to *Elizabeth*, from her to king *James*, who granted them to *Medhop*, who ſold them to *Crow* and others, who ſold them to *James* biſhop of *Meath*, and ſir *William Uſher*, who granted them to ſir *Robert Forth* and his heirs, and from him they deſcended

Damages. 2 Jones 128. 1 Vent. 348, 350. 2 Show. 56, 88.

ſcended to *John Forth* his ſon and heir, who ſold the ſame to *Thomas Taylor* and his heirs for 725*l.* and that the plaintiff as his bailiff gathered the tithes of four pole, part of the eleven pole lands of *Bally-Bruiſe*; and the defendant as rector of the pariſh of *Lurgan* in the dioceſe of *Kilmore*, ſues the plaintiff in the eccleſiaſtical court for the tithes of thoſe four pole lands, pretending that they lie within the pariſh of *Lurgan*, whereas they lie within the pariſh of *Darvy*; and the right and limits of pariſhes is to be determined at common law, *ad damnum* 100*l.*

Judgment was entered by default; and upon a writ of enquiry of damages, the jury found 100*l.* damages and
* P. 388. * 6*d.* coſts; and judgment was given for the 100*l.* and 28*l.* 5*s.* *de incremento*, for damages and coſts. The errors aſſigned upon the record, was only the general error. But the counſel inſiſted upon theſe;

1. The writ of enquiry finds 100*l.* damage, and 6*d.* coſts, and there is no notice taken in the judgment of the 6*d.* coſts; *ſed non allocatur.*

2. There is no *Viſne* laid where the ſuit in the eccleſiaſtical court was; ſo that if the defendant had pleaded *Non proſecutus fuit* after the writ of prohibition delivered, and Iſſue had been taken thereon, there could have been no trial. To this exception was anſwered, That all or moſt of the precedents are ſo; and the *Viſne* is never alledged in ſuch caſe. But upon examination I find theſe precedents to the contrary, *viz.* where there is a *Viſne* alledged in ſuch caſe, *viz.*

Hob. 306. *Wright* verſus *Gerard*, The record whereof is *Winch. Intr.* 642.

Co. Intr. 456. and *Co.* 2. 46. The archbiſhop of *Canterbury*'s caſe.

2 *Co.* 41. *b.* The biſhop of *Wincheſter*'s caſe.

Raſtal's Intr. 485. *Tit. Prohibition in Debt.* 3, 4, 5, 6, 7. and 488, 489. *In Diſmes* 3, 6. *In Treſpaſs* 2. *Plow.* 468. *b. Soby* verſus *Molyns.*

2 *Brownl. Intr.* 236. *Dowſe* verſus *Gooch* 239. *Hawkes* verſus *Parkman.*

Formulæ bene placitandi 1. 303, 314. 2. 187. *Mayhue* verſus *Green*, upon a *Modus Decimandi* 190. *Banks* verſus *Betty pro Diſmes in London.*

Liber placitandi 229 and 242. *al Court de Requeſts* 237. *pro ſubſtractione tabulæ ab Eccleſia* 238. *de modo decimandi* 245. *pur ſuant in le Marches de Wales.*

And I find this difference, *viz.* Where damages are given for the plaintiff, there generally he lays a *Viſne* where the ſuit

ſuit in the eccleſiaſtical court was; but otherwiſe the want of a *Viſne* hurts not. And judgment was reverſed for this reaſon by the opinion of the whole court.

* Thomas Ryder *verſus* Richard Hill. *London.* * P. 389.

DEBT for rent upon a leaſe parol. The defendant pleads, that the plaintiff *nihil habuit in tenementis tempore dimiſſionis.* The plaintiff replies, that 19 *Febr.* 1656. *John* lord *St. John* of *Baſing*, marqueſs of *Wincheſter*, was ſeiſed in fee, and ſo being ſeiſed, by indenture then dated, for money bargained and ſold, and *William Owen*, *Luke Cropley* and *Thomas Henſlow* confirmed to one *Richard Norton*, eſq; for ninety-nine years, 1 *March* 29 *Car.* 2. The eſtate of the ſaid *Richard Norton* by ſeveral meſne conveyances came to the plaintiff, by virtue whereof he became poſſeſſed, and demiſed to the defendant as is aforeſaid. The defendant demurs, becauſe the plaintiff doth not ſhew how he comes to the term. And it was adjudged for the plaintiff, that upon the trial the plaintiff may ſet forth all at large, and he ſhall not be compelled to lengthen the record by ſetting forth every deed. *Mich.* 18 *Car.* 2. *B. R. Cotes* verſus *Wade*, *ante fol.* 74. *b.* True it is, that 3 *Cro.* 22. *pl.* 5. ſeems contrary; but *ante* 55. *b.* agrees with this judgment. *Mich.* 1653. *B. R. Elſton* verſus *Drake.* In debt for rent, the caſe was, The plaintiff as adminiſtrator declares, *quod cum le Inteſtate demiſe al Defendant certain terre*, rendering rent to him, his executors and aſſigns, the defendant had not paid to the plaintiff, *unde actio accrevit*, &c. The defendant pleads *non detinet*, and found for the plaintiff; and it was moved in arreſt of judgment, becauſe the plaintiff doth not ſhew of what eſtate the inteſtate was ſeiſed or poſſeſſed; for if of an eſtate in fee, then the rent ceaſes by his death, and the words *per quod actio accrevit* will not help, though after a verdict, for the concluſion is not put to a jury, and action may accrue to adminiſtrator, though the inteſtate was ſeiſed in fee, for if the rent was in arrear in his life-time, the adminiſtrator may ſue for it. On the other ſide for the plaintiff it was urged, that it being after a verdict, and being an equal doubt, the beſt ſhall be taken for ſupport of the verdict; and the jury have found, *quod detinet*, and 'tis impoſſible that the defendant ſhould *detinere*, if the plaintiff had not cauſe of action. There was no judgment in this caſe of *Elſton* and *Drake*, becauſe the parties agreed to go to a new trial. But the whole court were

Diſcontinuance.

of

* P. 390. of opinion for * the defendant, but gave the plaintiff leave to discontinue, paying costs.

Mustard *versus* Harnden. *Error* C. B. *Case.* Essex.

Error.

THE plaintiff, *James Mustard*, declares that he was possessed of a hoy called the *Mary*, loaded with divers goods and chattels, and floating at anchor in the river of *Thames*, within the parish of *West Thurrock*, in a convenient place of the same river; and that the defendant *Thomas Harnden satis sciens*, the said 17 *May* 30 *Car.* 2. being master of the ship called the *Hound*, and then sailing in the said ship, in the said river towards the city of *London*, did govern the said ship so negligently and improvidently, that she sailing in the said river *in prædictam naviculam ipsius* the plaintiff so floating at anchor, as aforesaid, *violenter ruebat, & naviculam illam ut præfertur cnerat' fregit & submersit, ad damnum* 200*l.* The defendant pleads Not guilty. The jury said, that *quoad negligent. & improvidam gubernation. navis infra nominant' vocat' le Hound navigan. in Rivo Thamesis infrascript. per quod eadem navis in rivo præd. ut præfertur navigans in naviculam præfat. le Plaintiff in rivo præd. ad Anchorum fluctuan. violent. ruebat & naviculam ill. fregit & submersit*, the defendant is guilty, and assess damages to 50*l.* *Et quoad resid. de præmissis*, Not guilty, and judgment accordingly; and the error assigned was, that there was no *Residuum* to find the defendant Not guilty; for the first part of the verdict comprehends all the injury complained of in the declaration, and then the judgment, that the plaintiff shall be *in misericordia pro falso clamore*, as to the *Residuum* is not good; and of this opinion was the whole court, though the objection was, that it might be that the *Residuum* might be intended the *satis sciens*; but that was not allowed of, nor the goods with which the hoy was loaded; and so judgment was reversed.

* P. 391. * Obeden *versus* Keynel. *Dorset.*

Recusancy. 2 Jon. 187. 2 Show. 179. Postea 465.

DEBT upon 23 *Eliz. cap.* 1. for not coming to church. At the trial, after the jury sworn, and before verdict given, the defendant came into the court, and did there submit, recognize, confess and acknowledge, that he had offended and done ill in not going to church, and not conforming himself to the law therein, and did then prove that he

he had conformed himſelf ſince the ſuit brought by going to church, receiving the ſacrament, and behaving himſelf orderly and ſoberly during all the time of divine ſervice, according to the law; and did then and there promiſe and engage to conform, and go to church, and there to behave himſelf ſoberly and orderly, according to the law; and that the ſaid defendant was never indicted or proſecuted for any offence of this nature before.

This is an action for 20*l.* a month for not coming to church, tried the laſt aſſizes in *Dorſet*, and a verdict for the plaintiff for 40*l.* At the trial the defendant comes into court and conforms, and makes the above written recognition; Whether that doth diſcharge the action and verdict, or no, is the queſtion?

It was objected, that in the action *tam quam* the plaintiff hath an intereſt which ſhall not be diveſted within the intent of the clauſe in 23 *Eliz. cap.* 1. the words whereof are, *Every perſon guilty of any offence againſt the ſtatute (other than treaſon and miſpriſion of treaſon) which ſhall before he be thereof indicted, or at his arraignment or trial before judgment, ſubmit and conform himſelf before the biſhop of the dioceſe, where he ſhall be reſident, or before the juſtices where he ſhall be indicted, arraigned or tried (having not before made like ſubmiſſion at any his trial, being indicted for his firſt like offence) ſhall, upon his recognition of ſuch ſubmiſſion in open aſſizes or ſeſſions of the county, where ſuch perſon ſhall be reſident, be diſcharged of all and every the ſaid offences againſt this act (except treaſon and miſpriſion of treaſon) and of all pains and forfeitures for the ſame*; for that this clauſe refers only to ſuch caſes where the party is arraigned or indicted, and not to actions.

But it ſeems that the words ſhall be taken diſtributively at his arraignment, or trial before judgment, *i. e.* arraignment in caſe of indictment, and trial in all caſes. But no reſolution was given, but adjourned to farther conſideration. *Vide* 2 *Bulſtr.* 324. The king and *Shoile* verſus *Foſter*, The ſtatute of 29 *Eliz.* pardons all penalties of one conforming, except what is converted into one debt. 1 *Roll. Rep.* 94. *Poſt.* * P. 392.

Thomas

Thomas Horton, Elq; *verſus* Nanfan & al'. *London. Error in* C. B.

Error.

AN action in nature of a raviſhment of ward by guardian in ſocage. The plaintiff declares, that *William Finch* was ſeiſed of lands in *Kent*, *Cambridgeſhire* and *Hertfordſhire*, in fee, held in ſocage, and died without iſſue, by reaſon whereof the ſaid lands deſcended to his five ſiſters and co-heirs, all under the age of fourteen, and that he is next of kin to them, *viz.* brother to their mother. The defendant pleads, that the ſaid *William Finch* was tenant in tail, the reverſion in fee in the defendants; *abſque hoc*, that he was ſeiſed of the ſaid lands *modo & forma prout* the plaintiff hath declared; and iſſue thereupon, and tried in *London* where the action is laid, and found for the plaintiff, and damages 400 *l.* and judgment thereupon; and the error inſiſted was, that the ſeiſin of lands in *Kent*, and other counties, is tried in *London*. But the court ſeemed to incline that it is well enough after a verdict, by the ſtatute of 16 & 17 *Car.* 2. *cap.* 8. which is continued 22 & 23 *Car.* 2. *cap.* 4. *Sed adjournatur.*

Vide Raſt. 3.

Cartledge *verſus* Mawdlin. *Covenant. Southampton.* Intr. Mich. 31 Car. 2.

Common.

THE plaintiff declares upon articles intended, *dat.* 10 *Nov.* 22 *Car.* 2. between all the tenants, as well copyholders and inhabitants, and others, within the tithing of *Ramſdean* and *Langriſh*, within the manor of *Meon* in the ſaid county of *Southampton*, for the better regulating, ordering, governing, aſcertaining and ſtinting all ſuch cattle as afterwards ſhould be kept in and upon the common and waſte-ground called the ſtrood and *ſheet commons* within the
* P. 393. * ſaid manor, from time to time, thenceforth for ever; whereby it was agreed between them (amongſt whom the plaintiff and defendant were two) mutually, that no tenant or any other perſon claiming in, from or under him or them from thenceforth ſhould keep or put out into the ſaid commons, or either of them, after the 15th of *May* then next following, any number of beaſts, but only ſuch as by the ſame articles were expreſſed, limited and appointed, *viz.* The defendant three, *&c.* The plaintiff *in fait* ſays, that the defendant kept and put in 15 *March* 31 *Car.* 2.

and

and ſo to 1 *May* 32 *Car.* 2. four beaſts, *contra formam Articulorum prædict.* by reaſon whereof the plaintiff could not have ſo large common as he ought to have by virtue of the ſaid articles. The defendant pleads *actio non*, becauſe before the exhibiting the ſaid bill, and after the ſaid articles, *viz.* 9 *April* 28 *Car.* 2. the plaintiff and one *William Baker* by their writing then dated, remiſed, releaſed, and for ever quit-claimed to the defendant, his heirs, executors and adminiſtrators, all and all manner of actions and cauſes of action, *Sect', Billas, Obligation,' Scripta Obligatoria*, debts, dues, duties, accounts, ſum and ſums of money, judgments, executions, quarrels, controverſies, treſpaſſes, damages and demands whatſoever, as well in law as in equity, or any other ways or means whatſoever, which they the ſaid plaintiff, and *William Baker*, or either of them ever had, or then had or might have for or by reaſon or means of any matter, cauſe or thing from the beginning of the world to the day of the ſaid releaſe. To this the plaintiff demurs, and the queſtion is, whether any of the words in the releaſe will diſcharge theſe articles? And the moſt material for this purpoſe is, the word *Scripta Obligatoria*, which *ex vi termini*, is any writing under ſeal; but according to the uſual acceptation is bonds: but here it ſhould ſignify ſomething more, becauſe the word *obligations* is alſo in the releaſes. But my brother *Jones* ſaid, that writings made by ſcriveners very often, and for the moſt part, do contain divers words, which ſignify the ſame thing, to fill up the inſtrument, and to inlarge the reckoning; and ſo in this place; and of the ſame opinion ſeemed my lord chief juſtice and *Dolben* to be. And I added, that I conceive it was never the intent of the parties, that the plaintiff ſhould releaſe this agreement; for why ſhould he join another in the ſame deed of releaſe, who was not party (for aught appears by the record) to the ſaid agreement? And 2dly, there would * have been ſome notice taken of the common, had it been intended that the ſame ſhould have been included in the releaſe, and therefore the whole court inclined, that judgment ſhould be given for the plaintiff. * P. 394.

Pheaſant *verſus* Finch. *Eſſex.*

Intr. Hill. 31 & 32 Car. 2.

DEBT for 200 *l.* The plaintiff declares, that the defendant for eleven months together next before the 20*th* Qui tam.

20th of October 31 *Car.* 2. being above the age of sixteen, and inhabiting at *Halstead*, did not go to church, contrary to the form of the statute. The defendant demurs generally, and the sole question is, whether this suit may be commenced in this court, notwithstanding the statute of 21 *Jac. cap.* 4. The lord *Coke* 3 *Inst.* 194. says, that the informer cannot inform for this offence, or any other offence therein excepted, in any of the courts at *Westminster*, but before the justices appointed by the act, because the clause of excepting them out of the act, extends only for the laying or alledging any of those offences in any county that he will. But to me it seems, 1. That the words of the act are, *that all offences hereafter to be committed against any penal statute, for which any common informer may lawfully ground any popular action, bill, plaint, suit, &c. before justices of assise*, nisi-prius, *gaol-delivery, oyer and terminer, or justices of peace, shall be commenced, sued, prosecuted, tried, recovered and determined by way of action, plaint, bill, information or indictment before the said justices of Assise, &c. having power to inquire of, hear and determine the same, &c. and not elsewhere*; by which it seems that if they cannot determine the same, or that such actions will not lie before them, then they are to be determined, where such jurisdiction is given by the law. Now the statute of 23 *Eliz. cap.* 1. gives remedy by *action of debt, bill, information or plaint, &c.* And an action of debt cannot be commenced before the justices of assise, *&c.* either by writ or bill, and consequently it will not be within this statute of 21 *Jac. Et adjourn.* And *Mich.* 32 *Car.* 2. adjudged for the plaintiff; and many precedents were produced of informations in *C. B.* and this court, for the penalty.

* P. 395. * Durnford *versus* Irish. *Error in* Marleborough.

Error.

INDEBITATUS *assumpsit*; the error insisted on was, that the court is said to be held *coram Majore & Burgensibus Burgi præd. secundum consuetudinem ejusdem Burgi, a tempore quo, &c.* And the name of the mayor is not mentioned, which ought to be, 2 *Cro.* 184. *Ferrat* versus *Caldewel*, there was a writ of error of a judgment in *Burton upon Trent*, and said, *Coram Senescallo & Ballivo Domini Paget*, and shewed not their names, and held to be an incurable error, and seems a good exception. But it was adjourned; and after judgment was reversed.

Cutforthay

Cutforthay *verſus* Taylor. *Nott.*

TRESPASS *vi & armis* for taking the mare *ipſius Quer. necnon bona & catalla ſequen. viz.* and ſums them up, but doth not ſay they were the goods *ipſius Quer.* And thereupon the defendant demurs; and reſolved the plaintiff may have judgment for the mare, and releaſe the action for the reſidue; and it was ſaid, there are precedents of ſuch judgment, but I can find none. *Vide* 2 *Cro.* 104. *Woodhouſe*'s caſe upon the ſtatute of 37 *H.* 8. *cap.* 9. upon an uſurious contract. 1 *Cro.* 512. *Mulcany* verſus *Eyres.* Ejectment for one hundred acres of bog, and other things; the plaintiff releaſed his demand to that, and took judgment for the reſidue.

Error. 3 Danv. Ab. 78. p. 11.

Walſal *verſus* Mary Allen.

ACTION on the caſe for words. The plaintiff declares, that he being a clergyman, the defendant ſaid of him theſe words, *viz.* Francis Walſal *is a thief, and he ſtole plate from* Maudlin College *in* Oxford; *and I bought plate of one in* Oxford, *and gave it to the college for that plate, and thereby ſaved him from being hanged,* ad damnum 500 *l.* The defendant pleads in bar by attorney, that *ante diem, ſcilicet* 1 *Julii* 12 *Car.* 2. the plaintiff married the defendant, and thereupon the plaintiff demurred; and adjudged for the defendant, though pleaded in bar.

Words. A plea in bar held good though it ought to have been in abatement.

* Nappier & al. *verſus* Curtis & al. *In Treſpaſs.* Hill. 31 & 32 Car. 2. Rot. 20.

* P. 396.

THE plaintiff declares, that the defendants 8 *Auguſt* 30 *Car.* 2. *vi & armis* did break the plaintiff's cloſe called *Worgret common* within the pariſh of St. *Michael* in *Wareham,* and ſpoiled the graſs *ad valentiam* 40 *l. pedibus ambulando,* and other graſs of the plaintiff's *cum quibuſdam averiis, viz. Equis, &c. Necnon cum carucis plauſtris & aliis Carriagiis ſuis aliam herbam & ſolum clauſi præd. depreſſer. ſubverter. & ſpoliaver.* and in the ſaid cloſe did dig tobacco-pipe clay, and carried away two thouſand loads thereof to the value of 400 *l. tranſgreſſionem prædictam quoad depaſturationem conculcationem & conſumptionem herbæ præd. cum averiis, Et quoad depreſſionem ſubverſion. & ſpoliation. al. herbæ & ſoli clauſi præd. cum carucis*

carucis plaustris & al. cariagiis præd. necnon quoad effossion. in clauso præd. a præd. 8 die Augusti 30 Car. 2 usq. 23 diem Octobris 31 Car. 2 diversis diebus & vicibus continuando Et alia enormia, &c. ad damnum 500 l. The defendants demur; becauſe the ſeveral continuances of the treſpaſſes, are ſeveral treſpaſſes by themſelves, and ought not to be declared upon with a *Continuando. Mich. 20. H. 7. 3. pl. 7. Treſpaſs quare domum ſuam fregit 1 Maii, continuando* till 1 *Junii. Per Yaxley* it is good, *quia chescun entry eſt un fraction. Mes Curia contra, Bro. Treſpaſs* 441. but for feeding the graſs it is good, *ibid. Mich. 2 R. 3. 15. pl. 41. al meſne l'intent. Paſch. 17 Car. 2. B. R. Letchford* verſus *Elliot.* Treſpaſs for throwing logs into the plaintiff's cloſe with a *continuando*, not good, but if *diverſis diebus & vicibus* were in, it would be good, *Mich. 25 Car. 2. B. R. King* verſus *Treſpaſs quare clauſum fregit pedibus ambulando & proſterne ſes fences continuando* from ſuch a day to ſuch a day, after verdict ſeems not good. 2 *Roll Abr.* 549 *pl.* 5 9 *Car. 1. Hoſkins* verſus *Jennings*, for cutting of trees. But it ſeems the words *diverſis diebus & vicibus* do make the action good, as *Paſch. 5 Jac. B. B. 2 Roll. Abr.* 549. *pl. 6. King*'s caſe. Treſpaſs for ſpoiling corn in the blade, may be with a *continuando diverſis diebus & temporibus per* two years, though there cannot be a continuance of ſuch a treſpaſs for ſo long together. *Et adjournatur.*

* P. 397. * *Jamaica, October* 20. 1660.

In the year 1661. Sir *Charles Littleton* as deputy governor to the lord *Windſor* called the firſt aſſembly, which was held in *Jamaica*, and thereby made laws for raiſing a publick revenue by a tax on ſtrong liquors towards the upholding of the government there, which laws are indefinite and perpetual. Afterwards, *viz.* 15 *February* 1663. The king grants power to Sir *Thomas Modyford* to chooſe his own counſel, and with the conſent of the major part of them to frame general aſſemblies of freeholders, according to the uſage of other plantations, and with their conſent to make laws ſuitable to thoſe of *England*, which ſhould remain in force for the ſpace of two years, and no longer, unleſs approved by his majeſty. After Sir *Thomas Modyford*, Sir *Thomas Linch* ſucceeded, and after him the lord *Vaughan*, who had the like power with Sir *Thomas Modyford*: during the government of the lord *Vaughan*, the aſſembly granted the like

like revenue out of ſtrong liquors, but to continue but two years.

The queſtion hence aroſe, and which was referred by the privy council to the lord chief juſtice *North* to conſider and certify his opinion, and to take the opinion of ſuch other judges therein as he ſhould think fit, whether the law made by the aſſembly in the lord *Vaughan*'s time had totally laid aſide the law made in Sir *Charles Littleton*'s time by implication? And upon debate of the matter by the lord chief juſtice *North*, *Ellys*, myſelf and *Charleton* juſtices, and baron *Gregory*, it was reſolved, that the laſt council having power to make laws to continue but two years, did not repeal the perpetual law made before, but did ſuſpend its power during the two years, and no longer, according to the caſe of prices of wine, *Hob.* 215. where by 37 *H.* 8. *cap.* 23. a perpetual law was made for ſetting prices of wine; then by the ſtatute of 5 *E.* 6. the ſaid perpetual act (through the inadvertency of the parliament) was continued amongſt other acts till the end of the parliament, which continuance was reſolved to be idle as to that act; for an affirmative continuance of a perpetual ſtatute cannot work an abrogation thereof; and when the two years expire, it is as if no ſuch act had been made; for by 12 *Co.* 7. and 2 *Inſt.* 684. when an act of repeal is repealed, the firſt act repealed is revived.

* John Norris *verſus* Bayfield. *Error* C. B. *London.* * P. 398.

Variance.

IN ejectment of a meſſuage, with the appurtenances in the pariſh of ſaint *Chriſtopher*, of the demiſe of *Francis Norris* gentleman. Upon not guilty pleaded, verdict was given for the plaintiff, *quoad il. parcell. Meſſuagii prædict. jacen. proximam ad Meſſuagium modo infra nominat. Franciſci Neve & contin. ex Boreali parte inde in fronte juxta Thredneedle-Street ab Occiden. ad Orien. octo pedes, & in profunditatea Borea ad Auſtrum quindecim pedes, & contin. ex Auſtrali parte inde in fronte juxta Cornhil ab Occiden. ad Orien. tres pedes & dimidium unius pedis, & in profunditate ab Auſtro ad Boream quadraginta pedes, Et quoad reſiduum* for the defendant, and judgment is given *quod Quer. recuperet terminum ſuum prædictum de & in prædict. parcell. prædict. Meſſuagii jacen. proximum ad prædict. Meſſuagium ut præfertur in occupatione prædict. Franciſci Neve & continen. &c.*

Error general aſſigned, and the defendant pleads *In nullo eſt erratum.* But the chief error is, the variance between the

the verdict and the judgment. The verdict is, *Jacen. proximum ad Messuagium modo Franciſci Neve.* The judgment is, *Jacen. proximum ad Messuagium in occupatione prædict. Franciſci Neve.* Now if this variance be not amendable by the common law, it is not within any of the ſtatutes of *Jeofails*, unleſs the words of 16 and 17 *Car.* 2. *cap.* 8. will help it, which are, *but that all ſuch omiſſions, variances, defects, and all other matters of like nature, not being againſt the right of the matter of the ſuit, ſhall be amended, &c.* But I think, *of* and *in* the occupation are the ſame. *Et adjournatur.*

* P. 399. * Parſons *verſus* Edward Cottrel. *Debt upon an Obligation* of 100l. *dat.* 25 *Febr.* 31 *Car.* 2.

Intr. Trin. 31 Car. 2.

Debt. THE defendant pleads, that before the exhibiting the bill, and after the date of the ſaid obligation, *viz.* 17 *March* 31 *Car.* 2. By indenture between *John Ely* and the plaintiff of the one part, and one *William Cotterel*, and one *John Cotterel*, ſon of the ſaid *William*, and the defendant, of the other part, *hic in Cur. prolat.* the plaintiff releaſed to the defendant all claims and demands; *Et hoc, &c.*

The plaintiff demands oyer of the indenture, the words (as to this purpoſe) are, *the ſaid* John Ely *and* Thomas Parſons, *for and in conſideration of the ſum of* 50*l. to them or one of them paid, or ſecured by bond lately entered into by the ſaid* Edward Cotterel, *the receipt whereof they the ſaid* Thomas Parſons *and* John Ely *do, and either of them doth releaſe and acquit the ſaid* John Cotterel *and* Edward Cotterel, *and either of them, and their and either of their heirs,* &c. *and for other good cauſes,* &c. *have granted and releaſed to the ſaid* John Cotterel, *his heirs and aſſigns, all that meſſuage, &c. Quibus lectis & auditis,* the plaintiff replies, that the bond in the declaration, and the bond mentioned in the indenture are the ſame; *Et hoc, &c.* The plaintiff demurs. And I am of opinion for the plaintiff. 1. The intent is clear that this ſecurity ſhould not be diſcharged. 2. Claims and demands ſhall be intended for the money, and not concerning the bond. *Paſch.* 3 *Car.* 1. *Abree* verſus *Page.* Debt upon an obligation, the defendant pleads a releaſe of all errors, and all actions, ſuits and writs of error whatſoever. Adjudged, the releaſe extended only to writs of error. But the caſe of

* P. 399. *Ratheram* and *Crawley*, 3 *Cro.* 370. * and *Owen.* 71. *pl.* 142. ſeems otherwiſe: and therefore *Quære. Et adjournatur.*

Aglionby

Aglionby *versus* Isabella Towerson *Widow*. *Error in* Carlisle.

THE plaintiff declares, That 11 *November* 29 *Car.* 2. there was a discourse between the plaintiff and defendant of and concerning a marriage to be had between one *Christopher Richmond*, esq; his sister's son, and one *Isabel Reynoldson* niece of the defendant. Upon which the said defendant then and there, in consideration that the plaintiff at the special instance and request of the defendant would endeavour and labour to persuade the said *Christopher Richmond* to marry the said *Isabel Reynoldson*, did promise that she would pay the plaintiff 40*l.* if the said marriage should take effect. The plaintiff *in fait* says, That he 31 *Dec.* 29 *Car.* 2. and divers other days and times at the instance and request of the defendant, *Omnibus modis quibus poterat conatus fuit & elaboravit suadere præd. Christophorum* to marry the said *Isabel Reynoldson*, and that afterwards, *viz.* 1 *July* 30 *Car.* 2. the said marriage took effect, and yet the defendant hath not paid him the 40*l.* though *ult. Sept.* last past she was thereunto required. Assumpsit. 1 Danv. Ab. 73. p. 15.

The defendant pleaded *Non Assumpsit*, and verdict and judgment for the plaintiff, and 40*l.* damages; and the general error assigned; but the error insisted on was, That the plaintiff doth not shew how he did endeavour to persuade, and so uncertain, for he says only, *Omnibus modis quibus poterat*. But I conceive it is good enough; For 1. We shall not presume he did prevaricate, *Iniquum non est præsumendum*. 2. If he should set forth his speeches he made either in commendation of the young woman, or advantages of a married life, *&c.* the record would be too long, and perhaps we could not be competent judges of it, *Mich.* 1651. in *B. R. Barber* versus *Clerk*, *Assumpsit*, in consideration the plaintiff would renounce an executorship, the defendant would pay, *&c.* The plaintiff avers, *quod renunciavit*, and good; and yet the person before whom the renunciation was, might not be competent. *Mich.* 1661. *B. R. Baker* versus *Smith*. *Assumpsit*, The plaintiff being a virgin, had been prevailed with to make a contract with the defendant, and afterwards the defendant was desirous to be free; and thereupon the defendant * in consideration that the plaintiff would *disonerare*, *Anglice* would disengage, him of his promise, he promised to pay her 1000*l.* and she alledges, that she did disengage him; and adjudged good, without shewing how she * P. 401.

did disengage him; and the whole court seemed to agree, that the declaration in principal is good; but they perswaded the plaintiff to go to a new trial, and he was prevailed with, because the damages were great for so small a matter.

Mason *versus* Jennings.

Case.

IN a special action upon the case. The plaintiff declares, that he is a hackney-coachman, and that the defendant with an intent to disgrace him did *ride Skimmington*, and describes how, thereby forming that the plaintiff's wife had beat the plaintiff, and by reason thereof persons who formerly used him, refused to come into his coach and to be carried by him, *ad damnum*. Upon Not guilty pleaded, a verdict for the plaintiff; and upon motion in arrest of judgment, judgment was given *quod quer. nil capiat per billam*; and a judgment in the like case in *C. B.* was cited *Trin.* 14 *Car.* 2. *C. B. Rot.* 1461. in the case of *Lumley* and *Baddeley*.

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* P. 402. * Term. Mich. 32 Car. 2. 1680. B. R.

Jane Zinzan and Frances Zinzan *versus* Talmage.

Error in C. B. *Berks.*

Copyhold. 2 Danv. Abr. 183. p. 3. Pollexf. 561. 2 Jon. 142. 2 Show. 130.

IN ejectment of the demise of *Henry Zinzan, jun.* of three messuages, two hundred acres of land, forty acres of meadow, one hundred acres of pasture, and eight acres of wood in *Tylehurst*. The jury find a special verdict, That sir *Peter Vanlore, jun.* was seised in fee of the manor of *Tylehurst*, of which the lands in question are parcel, and held by copy of court-roll for one, two or three lives successively, one after the other, as they are named in the copy, according to the custom of the manor: Sir *Peter Vanlore*

Vanlore had iſſue three daughters, *viz. Jacoba*, wife of *Henry Zinzan, ſen. eſq*; *Suſanna*, wife of ſir *Robert Croke, knt. Mary*, wife of *Henry Alexander* late earl of *Sterling* in *Scotland*. The ſaid ſir *Peter Vanlore, jun.* at a court held 8 *March* 1638. granted by copy the lands in queſtion to *Henry Zinzan, ſen. Habend.* to him and to the ſaid *Henry Zinzan, jun.* leſſee of the plaintiff, and *Peter Zinzan* ſons of the ſaid *Henry Zinzan, ſen.* for their lives, ſucceſſively, as they are named in the grant, at the will of the lord, according to the cuſtom of the ſaid manor. *Henry Zinzan, ſen.* was admitted tenant, and entered and became ſeiſed for life, the remainder to *Henry Zinzan, jun.* and *Peter Zinzan* ſucceſſively. Sir *Peter Vanlore* died without any iſſue male, and the ſaid manor deſcended to his ſaid three daughters. Within the ſaid manor there is a cuſtom, That if any cuſtomary lands are granted by one copy to two or more perſons named in the ſame copy, for their lives, and the life of the longer liver of them ſucceſſively, then the firſt perſon in ſuch copy firſt named, may ſurrender all the lands, and thereby determine and deſtroy all the right, eſtate and title in the ſame tenements of all the other perſons therein named.

* By indenture quadripartite, 10 *May* 28 *Car.* 2. between * P. 403. the now earl of *Sterling*, ſon and heir of *Mary* late counteſs of *Sterling*, deceaſed, one of the daughters and co-heirs of the ſaid ſir *Peter Vanlore*, jun. deceaſed, and one of the grand-children and co-heirs of ſir *Peter Vanlore*, ſen. deceaſed, of the firſt part, the ſaid ſir *Robert Croke* and *Suſanna* his wife, of the ſecond part, the ſaid *Henry Zinzan* alias *Alexander*, ſen. firſt named in the ſaid copy, and *Jacoba* his wife, of the third part, and *Daniel Blagrave* and *Joſeph Baker*, of the fourth part, It was mutually agreed to levy a *Fine come ceo*, &c. to the ſaid *Blagrave* and *Baker*, of the manor of *Tylehurſt*, and of the lands in queſtion by name, to the uſe of the ſaid *Henry Zinzan*, ſen. and *Jacoba* his wife for their lives without impeachment of waſte, the remainder to the uſe of ſuch perſon or perſons, and for ſuch eſtate and eſtates, limitations, uſes, truſts, intents and purpoſes as the ſaid *Jacoba Zinzan* in her life-time, married or unmarried, by any writing or writings by her ſealed and ſubſcribed in the preſence of two or more credible witneſſes, or by her laſt will and teſtament by her ſealed and ſubſcribed in the preſence of two or more credible witneſſes, ſhould declare, nominate or appoint; and in default of ſuch declaration, nomination or appointment, to the only uſe of the right heirs and aſſigns of the ſaid *Jacoba* for ever. In *Trin.* term next a fine was levied accordingly. 20 *Novem-*

ber 1676 the said *Henry Zinzan, sen.* died, and the said *Jacoba* him survived. 22 & 23 *February* 1676 the said *Jacoba* by her indentures of lease and release conveyed the premisses to the said *Jane* and *Frances Zinzan* and their heirs, to the use of them and their heirs. 25 *June* 1677 *Jacoba* died, and the said *Jane* and *Frances* entered. *Henry Zinzan, jun.* being the second person in the said copy named, entered upon the possession of the said *Jane* and *Frances*, and demised to the plaintiff, upon whose possession the defendant re-entered. *Et sic, &c.* and judgment was given in *C. B.* for the plaintiff. And after argument in this court at the bar, judgment was affirmed by the whole court. The sole question was, Whether the conveyance of 10 *May* 28 *Car.* 2. and the fine pursuant thereto be a surrender within the custom to bar the estate of *Henry Zinzan*; and resolved it is not, because, 1. The custom extends only to the copyhold estate, and that cannot pass by the fine. 2. It being against common right shall be taken strictly. 'Tis against common right, because it gives power to tenant for life to destroy a third person's estate without any recompence. 'Tis taken strictly. * *Yelverton* 1. *Baspole* versus *Long*. A custom, that if a surrenderee comes not in upon the third proclamation, he shall forfeit the estate. A surrender is made to the use of *A.* for life, the remainder to *B. A.* comes not in, *B.* shall not forfeit.

* P. 404.

Elizabeth Chichester *versus* Michael Philips.

Intr. Pasch. 32 Car. 2. *Error out of* Ireland. *Ejectment.*

Error.
3 Danv. Abr. 111. p. 3.
2 Jon. 146.

THE plaintiff *Philips* in the action, brought the action first in *C. B.* in *Ireland*, and declared of the demise of *Roger Masterson, esq*; for eleven years. Upon Not guilty pleaded, and a trial at the bar in *C. B.* there was a bill of exceptions put in by the defendant, which was as follows:

Com. Wexford. ff. Memorandum qd. 11 Nov. 1678. existen. die præfix. per Justic. Domini Regis de C. B. hic in Craft. Animarum hoc Termino Sancti Michaelis 1678. supradict. ad triand. exit. inter Mich. Philips Gen. Quer. & Eliz. Chichester vid. Def. junct. de placito Transgr. & Ejection. firmæ Exit. præd. triat. fuit coram Roberto Johnson Arm. secundo Justic. Domini Regis de Banco prædict. & Adamo Gusack Arm. un. al. Justic. dicti D'ni Regis de Banco

Banco præd. ad Barram Cur. præd. præfat. Michael ſuppon. per breve & narration. ſua quod quidam Rogerus Maſterſon 11 die Januarii 29 Car. 2. *demiſed*, &c. *and recite the declaration and plea, and iſſue.* Et modo hic ad triation. exitus prædict. præfat. Michael dedit in evidenc. quod præfat. Rogerus ſeiſit. fuit de præmiſſ. prædict. in dominico ſuo ut de feodo, & ſic ſeiſit. exiſten. dimiſit tenementa præd. cum pertin. eidem Michaeli, Et quod ipſe idem Michael virtute ejuſdem dimiſſion. in tenementa præd. intravit, & fuit inde poſſeſſionat. quouſq; le Defendent luy eject, prout il ad declare.

That the defendant gave in evidence to prove that ſhe was Not guilty, That the ſaid *Roger Maſterſon* long before the ſaid demiſe to the plaintiff, *viz.* 4 *January* 1672. by indenture for money bargained and ſold the premiſſes to one *Edward Chicheſter* for 500 years, that the ſaid *Edward Chicheſter* afterwards, *viz.* 14 *February* 1673, did make his laſt will in writing, and thereof made his brother *John Chicheſter* his executor, and *William Hancock* overſeer. And to prove that he made the ſaid will, ſhe produced an inſtrument * under the ſeal of the prerogative court of *Canterbury*, reciting the ſaid will, and that the ſaid *John Chicheſter* was beyond the ſeas, and a grant of the adminiſtration to the ſaid *William Hancock* for ſo long time as the ſaid executor ſhall be beyond ſea, *dat.* 3 *Sept.* 1674. And alſo one other writing in parchment under the ſeal of the conſiſtory of the biſhop of *Ferns*, purporting a probate of the ſaid will by the executor himſelf, *dat.* 7 *November* 1678, that *Edward Chicheſter* named in the will, and in the probate, are the ſame perſons. That the ſaid *Edward* died in *England* 28 *May* 1673, and that the ſaid *John Chicheſter* the executor is alive. That the plaintiff gave in evidence another writing in parchment, under the ſeal of the prerogative court of *Ireland*, *dat.* 15 *December* 1677, whereby reciting that the ſaid *Edward Chicheſter* died inteſtate, the archbiſhop of *Armagh* granted adminiſtration to the plaintiff as principal creditor; whereupon the ſaid *Elizabeth* without any farther proof of the ſaid will, deſired the ſaid juſtices that they would direct the jury that the ſaid writings produced by her were concluſive evidence to prove that the ſaid *Edward Chicheſter* made the ſaid will, and ſo ſhe was Not guilty of the ſaid treſpaſs and ejectment.

* P. 405

Nevertheleſs the ſaid juſtices did only direct the jury that the ſaid writings were evidence, upon which they might find that the ſaid *Edward* made the ſaid will, but not that the ſame was concluſive evidence in that behalf, and ſo left it indifferently

indifferently to the jury, Whether the ſaid *Edward* made the ſaid will or no, though the plaintiff offered nothing againſt the ſaid will, but the ſaid letters of adminiſtration granted by the ſaid archbiſhop of *Armagh*; whereupon the jury found that the ſaid *Edward* made no ſuch will; thereupon judgment was given in *B. B.* for the plaintiff, and the defendant brought a writ of error in *B. R.* in *Ireland*, and there the judgment was affirmed; and now ſhe hath brought a writ of error here, and aſſigns for error, the not allowing of the evidence to be concluſive, as in the bill of exceptions is alledged. And here alſo judgment was affirmed by the whole court, becauſe though the evidence be concluſive, yet the jury may hazard an attaint if they pleaſe; and the proper way for the defendant had been to have demurred upon the plaintiff's evidence. This queſtion, whether the probate is concluſive, hath been variouſly allowed; but of later days it hath been adjudged, that nothing can be given in evidence againſt it, but forgery of it, or its being obtained by ſurpriſe.

* P. 406. * * Authorities, that the evidence is not concluſive.

Trin. 44 *E.* 3. 16. *a. pl.* 1. Debt againſt an adminiſtrator. The defendant pleads, That the party made a will, and the defendant and another his executors, and judgment of the writ, and produces the will in court under the ſeal of the ordinary. The plaintiff replies that he died inteſtate, and the defendant rejoins, that the plaintiff ought not to be admitted to aver that againſt the ſeal of the ordinary; but *non allocatur*.

The defendant's ſuggeſtion, and iſſue was taken, Whether he died inteſtate, or no, notwithſtanding the probate under ſeal. *Fitz. Eſtoppel* 9. *Br. Eſtoppel* 36. 9 *Co.* 31. *a.* 41. *a.*

Paſch. 22 *H.* 6. 52. *b. pl.* 25. By *Newton* and all his companions, the defendant may traverſe, that the plaintiffs were not made executors notwithſtanding the teſtament. *F. Executors* 17 *Bro Teſtament* 4. *Mich.* 34 *H.* 6. 14. *b. pl.* 26. By *Priſot*, a teſtament may be diſproved by the law of the church; as if *H.* makes two teſtaments and dies, the firſt teſtament is proved, and afterwards the ſecond teſtament, which is the laſt will, is found, and another named executor, in this caſe this laſt teſtament now ſhall be proved, and the other ſhall be void. If the firſt executor bring an action as executor, the defendant may well avoid it by ſpecial matter. *Mich.* 21 *E.* 4. 50. *a. pl.* 9. by *Choke* and *Cateſby*, where executors are plaintiffs, the defendant may ſay that the teſtator did not make them his executors, but

ſuch

ſuch an one, and the iſſue ſhall be taken upon the matter in fact, and upon the probate of the teſtament, for they might forge a teſtament; ſo in adminiſtration the iſſue ſhall not be taken on the letters of the biſhop, but on the matter *in fait*, *viz.* That the ordinary did not commit to them the adminiſtration by his letters. *Brv. Record* 28. A teſtament is not matter of record at the common law, notwithſtanding the probate, for *H.* may deny the making of the parties executors, and try it *per patriam*. *Raſt. Ent.* 325. Several pleas that the teſtator did not make the plaintiffs executors, and iſſue upon them. *Plow.* 282. *a.* The ſeal of the ordinary put to the adminiſtration is but matter *in fait*, which is not any *Eſtoppel* for the time, nor ſhall enforce the executor to ſue in the ſpiritual court to repeal it; but he ſhall avoid this by plea, or by taking the goods of the adminiſtrator, or by any matter *in fait*, as occaſion miniſters. *Dyer* 294 *b. pl.* 7. Iſſue was joined, if the biſhop of *London* hath committed adminiſtration, it ſhall be tried by the country. On the contrary, that the probate is not * traverſable; and ſo is the law at this day, *Roll.* 1 *Rep.* 226. *Trin.* 13 *Jac. B. R.* debt by an executor, he ſhews the will to the court proved by ſentence. The teſtator pleads the defendant died inteſtate, and that the adminiſtration was committed to him, and ſhews an appeal of the ſaid ſentence of the probate of the will. And by *Coke*, *Dodderidge* and *Houghton* it is not a good plea, becauſe if it ſhould, no executor ſhould have an action during ſuch appeal, which would be a grand prejudice.

* P. 407.

Memorandum, 3 *December* 1680. At one o'clock in the morning died ſir *William Ellys*, knt. one of the juſtices of the court of Common Pleas, at his chamber in *Serjeants-Inn* in *Fleet-ſtreet*, *Grandævus ſenectute*, viz. *ætat.* 71.

UPON the trial of the lord viſcount *Stafford*, who was impeached by the houſe of commons of high treaſon, the caſe fell out to be, that his charge was, *That he hired perſons to kill the king*. And upon the evidence it appeared, that *Stephen Dugdale* ſwore, that the priſoner proffered him 500*l.* to do it; and *Oates* another witneſs ſwore, that the priſoner received a commiſſion to be pay-maſter to an army to be raiſed by the *Roman Catholicks*; and *Turbervile* ſwore, that another five or ſix years before time, the priſoner at *Paris* proffered him a good reward to kill the king. And upon this evidence, the queſtion was put to all the judges then attending (who were all there, but *Scrogs* chief

chief justice, and *Ellys*, who was lately dead) Whether this was sufficient evidence for convicting the offender by the statute of 1 *E.* 6. *cap.* 12. and 5 *E.* 6. *cap.* 11. which requires two witnesses for convicting of a traitor, and for finding an indictment; and here is but one witness to each fact. And after conference between themselves, all the judges delivered their opinions *seriatim*, beginning with the lord chief justice *North*; that when the prisoner is charged with the offence of killing the king, and the evidence is, That he at several times laboured it, and by several ways, and to each particular time and fact there is but one witness, and yet every of the said facts conduces directly to the effecting and perpetration of the fact and treason charged upon the prisoner, such evidence is sufficient within the statute. But otherwise it had been if the facts had been tending to another several treason; and the reason given why such evidence was good, was because otherwise it would be
* P. 408. a most difficult thing, and almost * impossible to convict any one of high treason for compassing the death of the king, for such compassings are seldom acted in the presence of two witnesses at one time present. And upon this occasion my lord chancellor in the lords house was pleased to communicate a notion concerning the reason of two witnesses in treason, which he said was not very familiar he believed; and it was this, anciently all or most of the judges were churchmen and ecclesiastical persons, and by the canon law now, and then in use all over the christian world, none can be condemned of heresy but by two lawful and credible witnesses; and bare words may make a heretick, but not a traitor, and anciently heresy was treason; and from thence the parliament thought fit to appoint, that two witnesses ought to be for proof of high treason.

In the same trial of the said viscount, after the lords had *seriatim* voted (whereof thirty two acquitted, and fifty four condemned him) he moved in arrest of judgment, that every person arraigned ought by the law to hold up his hand at the bar, which he did not, nor ever was demanded so to do; and thereupon the opinion of all the judges was asked, who unanimously answered, That that ceremony was only for the making known the person of the offender to the court, and if he answers that he is the same person, 'tis all one; and so it falls out sometimes in the circuits, that some will not hold up their hand, and yet have been condemned; and judgment of high treason was given against the prisoner on

Tuesday

Tueſday the 7th of *December* 1680. by the lord chancellor *Finch*, who was high ſteward *pro tempore*.

John Stead *verſus* Elizabeth Berrier, Widow.

Error out of C. B.

EJECTMENT of the demiſe of *Thomas Stead* and *Judith* his wife, and *Richard Stockdale* and *Mary* his wife for five years. Upon Not guilty pleaded, the jury find a ſpecial verdict,

Deviſe. 2 Danv. Abr. 534. p. 10. 1 Vent. 341. 2 Lev. 243. 2 Jones 135. Pollexf 546. 1 Mod 267. 2 Mod. 313. 3 Keb. 845. 2 Show. 63.

That *Robert Berrier* of *Kingſton* upon *Hull* was ſeiſed of the lands in queſtion in fee, and had iſſue *William* his eldeſt ſon, and *Robert* his younger, and 29 *October* 1669. made his will in writing, and thereby deviſed in theſe words.

* *I deviſe and give to my ſon* Robert Berrier *and his heirs for ever, all that my farm*, &c. being the lands in queſtion, *&c. inter alia.* Item, *I give and bequeath unto my grandchild* Robert Berrier 100*l.* * P. 409.

26 *December* 1669. *Robert Berrier* the ſon of the teſtator died (the teſtator living) leaving iſſue *Robert Berrier* his ſon and heir.

Robert Berrier the grandfather 26 *March* 1671. made a codicil to be annexed to his ſaid will in theſe words,

And alſo I the aforeſaid Robert Berrier *do give and bequeath unto my grandchild* Judith Berrier, *and her heirs for ever, more than I have formerly given by this my laſt will and teſtament, a little cloſe, &c.* This I will ſhall be added as a codicil, and taken as part of my laſt will and teſtament.

The tenements by the ſaid codicil deviſed are ten acres of meadow, and ten acres in *Fithing*, part of the tenements deviſed by the ſaid *Robert* the grandfather to *Robert* the father.

The tenements in the declaration are the tenements deviſed by the will to *Robert* the father.

16 *May* 1671. *Robert* the grandfather did republiſh his laſt will, and by parol, and without any writing, *Animo teſtandi* did declare, That the ſaid *Robert Berrier* the grandſon by the ſame will ſhould take and have as the ſaid *Robert Berrier* his father might take and have.

1 *March* 1672. *Robert* the grandfather died, and *Robert* the grandſon him ſurvived, and entered into the ſaid premiſſes, and became ſeiſed *prout lex poſtulat.*

William Berrier eldeſt ſon of the ſaid *Robert* the grandfather, 25 *September* 1646. died, leaving iſſue *Judith* and *Mary* the leſſors of the plaintiff, whoſe huſbands in their

right

right entered on the poſſeſſion of the ſaid *Robert* the grandſon, and made the leaſe to the plaintiff. *Et ſi, &c.*

Judgment was given in *C. B.* for the defendant, and the plaintiff brings his writ of error, and aſſigns the general error. And by *Scregs* chief juſtice, *Jones* and myſelf, judgment was reverſed, but *Dolben* juſtice *contra*. We had all prepared to deliver our opinions openly in court, but in regard my lord chief juſtice had buſineſs of his own in the lords houſe, he deſired that he might deliver the ſenſe of the court without any argument; I was prepared with this to ſay for my opinion, *viz.*

* P. 410. * 1. I do not find at the bar any objection to the want of finding a good title for the plaintiff in this verdict, as was objected in *C. B. viz.* That it is not found that *Judith* and *Mary* wives of the leſſors of the plaintiff are grand daughters and heirs to the teſtator; neither do I find any ground for the objection; for it is found that *Robert Berrier* the teſtator had iſſue *William, primogenitum filium ſuum*, and alſo *Robert* father of the defendant his younger, and that *William* died in the lifetime of the teſtator, leaving iſſue the ſaid women, whereby in a ſpecial verdict it muſt be neceſſarily intended, that they are heirs at law to the teſtator.

In this caſe there have been two points in queſtion, both tending to the making good a title to the defendant.

1. Whether the new publication of 16 *May* 1671. whereby the teſtator did declare that *Robert Berrier* the grandſon by the ſame will ſhould take and have, as the ſaid *Robert Berrier* his father might take and have, did paſs any eſtate to *Robert* the grandſon?

2. If that point fail for the defendant, then, Whether by the words of the will, *I deviſe and give to my ſon* Robert Berrier *and his heirs for ever*, *Robert* the grandſon can take?

I hold in both points for the plaintiff in the action, and that the judgment (with all due reverence and reſpect to the perſons and court that gave it) ought to be reverſed.

As to the firſt point, I cannot diſtinguiſh it from the third point in *Bret* and *Rigden*'s caſe, *Plowden* 345. *b.* The words there were, *That* Thomas Bret *the ſon ſhould be heir to* Giles *(the deviſor) and that he ſhould have all the lands which his father by the will ſhould have, if he had lived*; and here the words are, *That* Robert Berrier *the grandſon ſhall take and have as his father might take and have.* It not being

being in writing cannot pass any thing, by reason of the statutes which appoint land to pass by will in writing. And so were *Gowdy* and *Clench*'s opinions in *Fuller* and *Fuller*'s case, 3 *Cro.* 423. But this point seems to be agreed with me at the bar, and therefore I shall not insist upon it farther.

As to the second point. Constructions of wills ought to be collected out of the words, and not *dehors*, or by averment, as 5 *Co.* 68. *Chenye*'s case; and therefore 39 *Eliz.* *Challoner* versus *Bowyer*, 2 *Leon.* 70. *pl.* 94. William Bowyer *had two sons, and devised his land to his younger son in tail, * the remainder to the heirs of the body of his eldest son, the remainder to his daughters in tail*; William Bowyer *dies, the younger son dies without issue, living the eldest son*; and in an assise, the tenant produced witnesses to swear that the devisor declared, *That as long as his eldest son had issue of his body, the daughters should not have the land*; but the court utterly rejected the evidence; and indeed were it otherwise, no man could advise his client, or know the certainty of any will; for if contrary to, or otherwise than what appears written might be averred, one will would appear in writing, and quite another upon evidence. * P. 411.

Which being so, it necessarily follows, that the parol declaration is out of doors in this will, and it is not at all to be taken notice of.

Then the words on which the defendant must rely for his title, are,

I give to my son Robert *and his heirs*, by which the defendant must take either as heir to his father, or as son to his grandfather.

The first he cannot, by *Bret* and *Rigden*'s case, in the second point there, because the words *(heirs)* is but to shew the quantity of the estate given, and to make them persons to take immediately by the will.

He cannot take as son, for these reasons.

1. The word *son* is never taken for *grandson*, no more than *child* is taken for *grandchild*. 3 *Cro.* 357. *Brown* versus *Pease*. *Warner* seised in fee of two manors, *Warners* and *Churchall*, devises *Warners* to the eldest son of his cousin *Richard Foster* in fee, and he devises the manor of *Churchall* to *Margaret Waters* for life, the remainder to such of his cousin *Foster*'s children as shall be then alive and owner of *Warners*. Resolved, If such son be dead, when *Waters* dies, the grandchild of *Richard Foster* shall not take; the reason is given, because out of the words *child* and *grandchild* are different persons.

2. The

2. The words *(ſon)* and *(grandſon)* are diſcriminating words in all inſtruments, and in this very will, for he gives the land to his ſon, and 100*l.* legacy to his grandſon.

3. By the ſame reaſon, the ſon of the grandſon may take; and it appears not whether this *Robert* had a ſon named *Robert*.

4. It was not the intent of the deviſor (as expreſſed in the will) *That the grandſon ſhould take*, for he makes him a diſtinct legatee.

* P. 412. * 5. The inconvenience which would enſue, ſhould the word *(ſon)* be ſo taken; no certain conſtruction could be made, for ſo *godſon, great grandſon, ſon-in-law, &c. may take*, and no body can gueſs whom the teſtator meant. The ſame miſchief would happen, as by an averment before-mentioned.

Had the defendant been called frequently by the teſtator in his life-time, his ſon, he had been capable to take by that name; as an illegitimate ſon may take by the name of the reputed father, after he hath acquired a certain name by reputation.

But it is not found in the whole record, that the teſtator knew of the death of his ſon *Robert*. True it is, that the parol declaration diſpoſes to the defendant what was given to his father, but that may be as well for other reaſons as for death.

Object. The new publication is as if the will were new writ over again.

Reſp. I grant it. But then if the words are the ſame, there will no more paſs than by the firſt writing.

If he had deviſed to *Robert Berrier* (without addition) or to my heir *Robert* (if the truth were, that his heir at his death proved to be *Robert*) this new publication would have made the will have paſſed the lands, becauſe the words would have agreed with the perſon of the deviſee, as in *Beckford* and *Parnell*'s caſe. 3 *Cro.* 493. *Perſons* ſeiſed of lands in *Aldworth* deviſed all his lands there to his daughters *Barbara* and *Joan*, and then purchaſes more, and then new publiſhes his will. Reſolved, The new purchaſed lands paſſed, becauſe ſufficient words; ſo is *Bret* and *Rigden*'s caſe in the ſecond point there.

Object. By the record it appears, that the deviſor intended to paſs the land to his grandſon the defendant.

Reſp. The intent appears not by the will. 2. That intent was not according to law, and the intent muſt be ſubſervient to the rules of law, and not *e contra*, as *Camden* and *Clark*'s caſe is, and many caſes might be cited on that head.

head. And *3dly*, wills muſt have an apparent intent, when they diſinherit an heir. 1 *Cro.* 369. *Sprit* verſus *Bence.*

As to the leaſe made by two copartners and their huſbands, *Vide Moor* 682. *pl.* 939. *Millener* verſus *Robinſon*, *Noy* 13. 2 *Cro.* 83. *Jurdain* verſus *Steer* 166. *Mantle* verſus *Wollington.* It ſeems good enough after a verdict; and judgment was reverſed.

* Harriſon *verſus* Belſey. *Canc. Ejectment.* * P. 413.

JOHN PEPPER ſeiſed in fee, by leaſe and releaſe for 100 *l.* conveys the lands in queſtion, *to the uſe of* Paul Barret Sen. *and* Sarah Barret *his daughter, for their lives, the remainder to the uſe of the firſt, and every other ſons of* Sarah *in tail male, the remainder to the uſe of her daughters equally to be divided in tail male, the remainder to the uſe of the right heirs of* Paul. Sarah *by deed gives, grants, remiſes and releaſes all her right and eſtate to the ſaid* Paul *and his heirs, to the uſe of him and his heirs. Sarah* marries *Samuel Hall*, and hath iſſue *Samuel Hall* leſſor of the plaintiff. *Paul Barret* by indenture 22 *May* 28 *Car.* 2. covenants to ſtand ſeiſed *to the uſe of himſelf for life, the remainder to* Sarah Norwood *his grandchild for her life, the remainder to* Paul *and* Thomas Norwood *his grandchildren, and their heirs.* Paul *dies.* Remainder. 1 Vent. 345. 2 Jon. 136. 2 Show. 91. Pollexf. 573.

The ſole queſtion of this caſe is, whether the remainder limited to *Samuel Hall* leſſor of the plaintiff, as firſt ſon of *Sarah*, be deſtroyed by *Sarah*'s releaſe?

And I conceive it is not, and that judgment ought to be given for the plaintiff.

1. It cannot be denied by the other ſide, but that *Paul Barret* and *Sarah* were joint-tenants for their lives, and that the eſtate in fee-ſimple is not executed in *Paul Barret*. *Coke upon Littleton* 182. *a.*

For though a diſcent or any other ſubſequent conveyance will deſtroy the jointure, as *Weſtcot*'s caſe is, 2 *Co.* 60. yet till then they remain joint-tenants.

Coke upon Littleton 273. Two coparceners of a rent, and one marries the ter-tenant, the other may releaſe to her that was married.

'Tis requiſite for the execution of all contingent remainders, that the particular eſtate do continue the ſame it was at the time of the creation thereof, when the uſe comes *in eſſe*; for it muſt veſt either during the particular eſtate, or at leaſt *eo inſtante* that the particular eſtate determines. 1. *Co.* 66. *Archer*'s caſe.

3. This

3. This releaſe doth not alter the eſtate. 1 *Coke upon Littleton* 273. Such a releaſe is no alienation, *Winch* 63. *Waſe* verſus *Pretty*. By *Winch.* juſtice, and *Hobart*, if land be given to two upon condition, that they ſhall not alien, * P. 414. and † one releaſes to the other, it is no breach of the condition. 2. It makes no degree, for the releſſee is in by the leſſor. *Coke upon Littleton* 184.

And though the remainder did before depend upon an eſtate for two lives, and now but on one, that one is the ſame eſtate in quality, though not in quantity.

Fitz. Aid, 77. Tenants in ſpecial tail recover in aſſize, and afterwards one dies without iſſue, and the other being tenant in tail after poſſibility, is rediſſeiſed, he ſhall have a rediſſeiſin, becauſe it is the ſame freehold which he had before, and is part of the eſtate-tail.

I conceive the caſe of a condition of accruer is a ſtronger caſe; there the eſtate on which the condition is to grow muſt continue the ſame. And yet 8 *Co.* 75. *b.* If a man grant land to another and his heirs on the body of his wife, with ſuch a condition, and the wife dies without iſſue, yet he may perform the condition.

4. The intent of the parties (which is obſervable in all acts, and eſpecially in the diſpoſition of eſtates) was only to transfer *Sarah's* eſtate to *Paul*, and not to deprive her children, ſhe being but tenant for life.

Her acts ſhall be conſtrued with as much ſtrictneſs as the rules of law will permit. Judgment was given for the plaintiff by *Scrogs* chief juſtice, *Jones* and myſelf: but my brother *Dolben* was for the defendant, but had not opportunity to ſhew his reaſons, becauſe my lord chief juſtice deſired that he might deliver all our opinions ſhortly.

Oſborn *verſus* Wandel.

Treſpaſs.

TRESPASS upon the ſtatute of 1 *R.* 3 *cap.* 3. for taking the plaintiff's goods (being arreſted for ſuſpicion of felony) before conviction, and declares of ſeizing a certain parcel of money; and after verdict for the plaintiff, *Stanhope* moved in arreſt of judgment, becauſe the words of the ſtatute are, *that none ſhall ſeize the (goods) of any perſon, &c.* and money is not goods, *Fitz. Brief* 512. But adjudged for the plaintiff, and that money is goods; and that caſe is only the opinion of *Finchden.*

Valentine

* Valentine Joyner *verſus* Sir Robert Vyner. *Error.* * P. 415.
in C. B. *London.*

Intr. Paſch. 32 Car. 2.

DEBT upon a bond againſt the defendant as ſon and heir of *Chriſtopher Joyner*. The defendant demands oyer of the condition, which is, *whereas the above-bound* Chriſtopher Joyner *did* 4 December 1665, *leave with* Henry Lewys, *then ſervant to the above-named Sir* Robert Vyner, *a bill of exchange of the ſum of* 61 *l.* 14 *s.* 4 *d. payable by* Richard Fuller *late of* London *merchant, deceaſed, and upon leaving the ſaid bill the ſaid* Chriſtopher Joyner *had credit in his account with the ſaid Sir* Robert Vyner *for the ſaid ſum of* 61 *l.* 14 *s.* 4 *d.* And whereas the ſaid *Henry Lewys* doth aver that the ſaid ſum of 61 *l.* 14 *s.* 4 *d. was not paid to the ſaid Sir* Robert Vyner, *or any other perſon for his uſe, the condition therefore of this obligation is ſuch, that if the ſaid* Chriſtopher Joyner *ſhall not, before the* 10*th of* November *next the date above-written, legally and ſufficiently prove, that the ſaid ſum of* 61 *l.* 14 *s.* 4 *d. was paid to the ſaid Sir* Robert Vyner, *or to his uſe, then if the ſaid* Chriſtopher Joyner, *his heirs, executors, adminiſtrators or aſſigns do well and truly pay or cauſe to be paid to the ſaid Sir* Robert Vyner, *his executors or aſſigns upon the ſaid* 10*th of* November *the ſaid ſum of* 61 *l.* 14 *s.* 4 *d. and all intereſt at* 6 *l. per* 100 *l.* per annum *accrewing for the ſaid money, from the ſaid* 4*th day of* December 1665. *until the payment thereof, that then this obligation to be void.* Quibus lectis & auditis, the defendant pleads, that the ſaid *Chriſtopher Joyner* his father, after the making of the ſaid bond, and before the ſaid 10*th* of *November viz.* 20 *May* 24 *Car.* 2. died. The plaintiff demurs; and adjudged by the whole court for the plaintiff; for there is a difference where the condition contains a duty veſted in the obligee, and where it is only a collateral act; for in the firſt caſe the executors are bound to perform it; and ſo the obligor forfeits his obligation if it be not performed. 3 *Cro.* 10. *Kingwell* verſus *Knapman*, 2 *Leon.* 155. Debt upon an obligation, conditioned, that whereas there were divers controverſies between the plaintiff and the brother of the defendant, and they ſubmitted themſelves to the * arbitrement of one *Coxin*. Now if the ſaid brother perform the award, then, *&c.* The defendant pleads that the arbitrator made an award that the brother ſhould pay 30 *l. viz.* 20 *l.* at *Eaſter*, and 10 *l.* at *Michaelmas*, and that he paid the 20 *l.* but

Award.

* P. 416.

but before *Michaelmas* he died; and adjudged for the plaintiff, becauſe the ſum awarded was become a duty; but otherwiſe where no duty, as to make a feoffment, or to prove an allegation in a bill of equity. *Dyer* 262. *a. pl.* 30. *Arundel* verſus *Comb.*

Dorothy Lee, Adminiſtratrix of William Lee her Huſband, *againſt* Charles Garret and Mary his Wife, Executrix of Frances Ambler. *Midd.*

Debt.
2 Show. 143.

DEBT upon an obligation of 600 *l. dat.* 11 *Aug.* 1657. the condition whereof (upon oyer demanded) is, *that whereas a marriage hath been lately had between the above-named* William Lee *and* Mary *daughter of the above-bound* Frances Ambler; *if now the heirs, executors, adminiſtrators or aſſigns of the ſaid* Francis Ambler *do and ſhall well and truly pay or cauſe to be paid unto the ſaid* William Lee, *his executors, adminiſtrators or aſſigns the full and whole ſum of* 300 *l. within two months next after the death of the ſaid* Frances Ambler, *if the ſaid* Mary, *or any iſſue of her body by* William *ſhall be living at the death of the ſaid* Frances. *Then, &c.* The defendant pleads, that 1 *January* 29 *Car.* 2. the ſaid *William Lee* died inteſtate, and the ſaid *Francis Ambler* him ſurvived; and 15 *Febr.* 31 *Car.* 2. died, and that the ſaid *Mary* the wife of *William Lee* died before the ſaid *Frances*, leaving the ſaid *Mary* wife of the defendant.

That at the death of the ſaid *Frances*, nor any time within two months next after the death of the ſaid *Frances*, there was no executor or adminiſtrator of the ſaid *William Lee*, nor any perſon appointed on the behalf of the ſaid *William Lee*, to have or to receive the ſaid 300 *l.* in the ſaid condition mentioned, nor to whom the ſame could be paid according to the form of the ſaid condition; and that adminiſtration of his goods and chattels was not granted within one year next after the death of the ſaid *Frances*. The plaintiff demurs generally; and adjudged for the plaintiff, becauſe the money being a duty, the defendant ought to have pleaded, *uncore priſt, &c.*

* P. 427. *Attorney General *verſus* Blood, Chriſtian & al. *Midd.*

Conſpiracy.
2 Show. 114.

AN information for conſpiring to indict the duke of *Buckingham* of buggery of a boy called *Nemar*. Upon not

not guilty pleaded, they were tried at the bar in *Trinity-term* laſt, and found guilty. And *Saunders* moved in arreſt of judgment.

1. That the writ of *Venire facias* was *probos & legales homines*, whereas it ought to have been *liberos & legales homines*, for there is a difference between *probus*, *liber & legalis*, for *legalis* is he who is not outlawed, and againſt whom no exception can be taken in this behalf. *Probus* is not taken notice of in law. *Liber homo* is not only one that hath freehold land, but that hath freedom of mind, and ſtands indifferent, no more inclining to the one than the other, *Coke* upon *Littleton* 155 *b.* but *probus* extends not ſo far.

2. The writ is *quorum quilibet* may expend 20 *l.* in lands; and yet the ſtatute of 16 & 17 *Car.* 2. *cap.* 3. is expired; and the defendant may be kept in durance and impriſonment for default of jurors of that value; and the ſtatutes of 35 *H.* 8. *cap.* 6. and 27 *Eliz. cap.* 6. preſcribe a certain form for the writ; and though thoſe ſtatutes of themſelves extend not to pleas of the crown, yet the ſtatute of 4 & 5 *Ph. & Mar. cap.* 7. directs the ſtatute of 35 *H.* 8. to extend to ſuch caſes; and the form being preſcribed, ought not to be varied from, 1 *Roll. Abr.* 803. *n. pl.* 4. *Ludlow* verſus *Edgworth*. *Scire* for *Sciri*, reſolved not good; and *pl.* 5. *quorum quilibet* had 4 *l.* in an inferior court; judgment was reverſed for that cauſe. And here no ſtatute of *Jeofails* helps, becauſe an information for the king.

Pollexfen for the attorney general. 1. *Probos & liberos* are of one ſenſe; and the ſtatute doth not tie the writ to the very words; and there are multitudes of precedents, which are thus.

2. 'Tis for the advantage of the defendant to have a ſubſtantial jury, 2 *Cro.* 672. *Philpot* verſus *Feeler*, 3 *Cro.* 257. *Morris* verſus *Thomas*. And before the ſtatutes it was, and now is in the power of the court to award a *Ven. fac.* of what larger ſum they pleaſe.

* And the chief juſtice, and the other two juſtices were clear, that the writ was good for the reaſons alledged by *Pollexfen*; and ſo was I as to the firſt exception; but I was not, nor yet am ſatisfied as to the ſecond exception; for if it ſhall be in the power of the court to put what ſum they pleaſe in the *Venire fac.* the defendant being in priſon may be there detained for want of jurors of that value; but judgment was given againſt the defendant *Chriſtian*, (for *Bagot* was dead) and one more, *viz. That* Chriſtian *ſhould ſtand in the pillory an hour at* Charing-Croſs, *between ten and twelve,* * P. 418.

and pay one hundred marks, and lie in prison till he paid it. The other was fined twenty marks, and awarded to the pillory.

Gray *versus* Day.

Case.
1 Danv. Ab. 211. p. 18.
2 Jon. 132.
2 Show. 144.

AN action upon the case. The plaintiff declares, that he being church-warden of such a parish, and having given an account at the end of his year to his successor, and the parishioners; the defendant falsly and maliciously cited him into the ecclesiastical court to render an account, and there at the defendant's request the judge excommunicated the plaintiff for not rendering an account. Upon not guilty pleaded, and verdict for the plaintiff, *Saunders* moved in arrest of judgment, because the sentence was given by the judge, and so he and the court were to blame, and not the defendant. But resolved the action lies; and judgment was given for the plaintiff; and in this case for the plaintiff were cited 1 *Cro.* 291. *Carlion* versus *Mill*, 2 *Cro.* 667. *Steer* versus *Scoble*, 355. *Weald* versus *Pease*, 3 *Cro.* 574. *Willis* versus *Stroud*. *Jones* 312. 1 *Roll. Abr.* 34. *c. pl.* 4. 112. *p. pl.*

Anne Crouche *versus* Fastolfe. *London.*

Rent.

DEBT for rent upon a lease for years, by indenture, of a messuage in *Redrith* in *Surrey*. The defendant pleads, that upon *Christmas-day* (being the quarter-day for which the rent is demanded in the declaration) he was at the said messuage by the space of an hour before sun-rising until sun-setting, of the same day, ready to pay the said rent, and that neither the plaintiff nor any other on her be-
* P. 419. * half came or was ready there to receive it; and that he always since the said day hath been, and yet is ready to pay the same, *& denar. ill. idem Johannes hic in Cur. profert parat. fore solvend. præfat. Annæ, si eadem Anna illos de eodem Johanne recipere velit. Et hoc, &c.* And upon this the plaintiff demurs, because the defendant hath not alledged a tender on the day, but only that he was there ready to pay the rent. But resolved it is well enough; and adjudged for the defendant. 14 *E.* 4. 4. 22 *H.* 6. 57. 21 *E.* 4. 6. 7 *Co. Maund's* case. *Hob.* 207. *Crowley* versus *Kingswell*. *Winch Intr.* 1032. 1 *Cro.* 76. 3 *Cro.* 828. 1 *Leon.* 71. *pl.* 95. *Bret* versus *Audar*. And tender needs not; but otherwise where there is a condition, the breach whereof is to be saved.

Memorandum,

Term. Hill. 32 & 33 Car. 2. B. R.

Memorandum, 29 December 1680. *Sir* John Kelyng *knight, of counſel extraordinary to the king, and his ſerjeant, died at his houſe in* Southill *in* Bedfordſhire.

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* Term. Hill. 32 & 33 Car. 2. B. R. * P. 420.

Leeſon *verſus* Dover. *London.* Trin. 32 Car. 2.

DEBT upon a bond of 600 *l. dat.* 19 *Junii* 27 *Car.* 2. The defendant demands oyer of the condition, which is, *whereas there hath been a marriage lately ſolemnized between the above-named* John Leeſon *and* Anne Dover, *daughter of the above-bound* John Dover, *and that the ſaid* John Dover *did promiſe to pay the ſum of* 500 l. *as the marriage portion of the ſaid* Anne *to the ſaid* John Leeſon, 200 l. *of which ſaid ſum hath been paid accordingly by the above-bound* John Dover. *Now if the above-bound* John Dover *ſhall and do well and truly pay or cauſe to be paid the due intereſt of* 300 l. *yearly, and every year, being* 18 l. *unto the above-named* John Leeſon *at two times or feaſts in the year by equal portions, that is to ſay,* 9 l. *upon the feaſt of St.* Thomas the apoſtle *next enſuing, and the other* 9 l. *upon the feaſt of St.* John the Baptiſt, *which ſhall be in the year of our Lord* 1676. *And it is farther the condition of this obligation, that the above-bound* John Dover *ſhall retain the principal money, being* 300 l. *as aforeſaid, in his hand, for the uſe of the ſaid* Anne, *until ſuch time as the ſaid* John Leeſon *ſhall ſettle, or cauſe to be ſettled, upon the ſaid* Anne, *a jointure equal in value to the ſaid ſum of* 300 l. *and then, that the above-bound* John Dover *ſhall upon half a year's notice thereof pay the ſaid ſum to the ſaid* John Leeſon, *to be to his own proper uſe for ever; all which the above-bound* John Dover *ſhall well and truly perform and keep; then this obligation to be void.* Quibus lectis & auditis, the defendant pleads, *Actio non*, for that he paid the ſaid *John Leeſon* 9 *l.* on St. *Thomas's day* next following the date of the ſaid obli- Condition.

gation, and the other 9 *l.* on St *John Baptiſt's day* 1676. according to the form of the condition. That he retained the ſaid ſum of 300 *l.* for the uſe of the ſaid *Anne Leeſon* till
* P. 421. the * plaintiff ſhould ſettle a jointure, which he hath not yet done. The plaintiff demurs, becauſe the defendant doth not plead payment of intereſt for the ſaid 300 *l.* after the firſt year; and it was adjudged for the plaintiff by the whole court, (except *Scrogs* chief juſtice who was abſent) for that upon the whole condition it appears, that the intent of both parties was, that intereſt ſhould be paid for the 300 *l.* for theſe reaſons,

1. By the preamble of the condition it appears, that 500 *l.* was to be the marriage portion of *Anne*, and that the plaintiff was to have it without reſpect to the making of a jointure.

2. The words are, that the defendant ſhall pay due intereſt for the 3000 *l.* yearly, and every year, which muſt neceſſarily extend beyond one year.

3. The principal was to be retained till ſettlement, which implies that he was to pay intereſt: for principal and intereſt are relatives.

Lambert & Olliot *verſus* Beſſey. *Error.* C. B. Paſch. 31 Car. 2. Rot. 382. *Norff.*

Impriſonment. 2 Jon. 214. Skin. 49. Poſtea 467.

TRESPASS and falſe impriſonment. The plaintiff declares, that the defendants *Lambert* and *Olliot ſimul cum Bowles Ringall, Barlee* and *Woodcroft*, 1 *April* 29 *Car.* 2. *vi & armis* did take and impriſon the plaintiff *Beſſey*, and him did evil intreat at *Worſtead*, and ſo in priſon did him from thence to *Ayleſham* lead, and there for the ſpace of three weeks did detain, till he paid them 7*s.* 4*d.* *Et alia enormia, &c. ad dammum* 100*l.* The defendant *Lambert* pleads not guilty, and after iſſue joined, the plaintiff enters a *Nolle Proſequi* as to *Lambert*. The defendant *Olliot*, as to all but the impriſonment pleads not guilty; and as to the impriſonment at *Ayleſham* for three weeks, he ſays, that 12 *Febr.* in *Hillary-Term* 28 & 22 *Car.* 2. there iſſued out a writ of *Non omittas* out of the court of *C. B.* againſt one *Stephen Green*, and againſt the plaintiff, and one *Thomas Palmer*, at the ſuit of Sir *John Hobart* baronet, directed to the ſheriff of *Norfolk*, by which ſaid writ the king commanded the ſaid ſheriff that he ſhould take the ſaid parties, and have their bodies at *Weſtminſter* before the juſtices of *C. B. Menſe*

C. B. *Menſe Paſch.* then next following, to anſwer the ſaid Sir *John Hobart* in a plea of treſpaſs *quare clauſum fregit*, and a debt of 200*l.* which ſaid writ the ſaid Sir *John Hobart*, 21 *March* 29 *Car.* 2. delivered to the then ſheriff of *Norfolk* to be executed, by virtue whereof, and to the intent the ſaid writ might be executed, the ſaid ſheriff made a warrant to the bailiff of the liberty of the duke of *Norfolk* in the ſaid county, who then had, and yet hath execution of all writs within the ſaid liberty, and return thereof, *Infra quam executio iſtius brevis totaliter reſtabat faciend. pro eo quod nulla alia executio inde alibi extra libertat. prædt. infra ballivam ſuam fieri potuit*, which ſaid warrant the ſaid Sir *John Hobart* delivered to *Arthur Onſlow*, eſq; then bailiff of the ſaid liberty 28 *March* 29 *Car.* 2. to be executed; by virtue whereof the ſaid *Arthur Onſlow* made a warrant the ſame day to the ſaid *William Woodcroft* and *Samuel Bowles* his deputy bailiffs, to take the ſaid *Beſſey*, &c. by virtue whereof the ſaid *Woodcroft* and *Bowles*, 1 *April* 29 *Car.* 2. took the ſaid *Beſſey* and carried him to *Ayleſham*, and delivered him over to the ſaid *Simon Olliot* then keeper of the priſon of the bailiff of the liberty aforeſaid, at *Ayleſham* aforeſaid; by virtue whereof the ſaid defendant took him the ſaid *Beſſey* and detained him by the ſpace aforeſaid, *prout ei bene licuit, quæ fuit eadem impriſonamenta*, &c. *Et hoc*, &c. *unde*, &c. The plaintiff replies, that the defendant *Olliot* impriſoned him *de injuria ſua propria, abſque hoc*, that the ſaid *Woodcroft* and *Bowles* did take the plaintiff within the ſaid liberty of the ſaid duke of *Norfolk*. The defendant demurs, and ſhews for cauſe, that the plaintiff traverſes a matter not traverſable; and judgment was given in the Common Pleas for the plaintiff, and damages 100*l.* and the defendant brought a writ of error; and I conceive judgment ought to be affirmed. * P. 422.

1. In all civil acts the law doth not ſo much regard the intent of the actor, as the loſs and damage of the party ſuffering; and therefore *Mich.* 6. *E.* 4. 7. *a. pl.* 18. *Treſpaſs quare vi & armis clauſum fregit, & herbam ſuam pedibus conculcando conſumpſit* in ſix acres. The defendant pleads, that he hath an acre lying next the ſaid ſix acres, and upon it a hedge of thorns, and he cut the thorns, and they *ipſo invito* fell upon the plaintiff's land, and the defendant took them off as ſoon as he could, which is the ſame treſpaſs; and the plaintiff demurred; and adjudged for the plaintiff; for though a man doth a lawful thing, yet if any damage do hereby befal another, he ſhall anſwer it, if he could have avoided

* P. 423. avoided it. As if * a man lop a tree, and the boughs fall upon another *ipso invito*, yet an action lies. If a man shoot at buts, and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop the sallows growing upon the river side, which accidentally stop the water, so as your mill is hindered, an action lies. If I am building my own house, and a piece of timber falls on my neighbour's house and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there, *Actus non facit reum nisi mens sit rea.*

Mich. 23 *Car.* 1. *B. R. Stile* 72. *Guilbert* versus *Stone.* Trespass for entering his close, and taking away his horse. The defendant pleads, that he for fear of his life by threats of twelve men, went into the plaintiff's house and took the horse. The plaintiff demurred; and adjudged for the plaintiff, because threats could not excuse the defendant, and make satisfaction to the plaintiff.

Hob. 134. *Weaver* versus *Ward.* Trespass of assault and battery. The defendant pleads, that he was a trained soldier in *London*, and he and the plaintiff were skirmishing with their company, and the defendant with his musket *casualiter, & per infortunium & contra voluntatem suam* in discharging of his gun hurt the plaintiff; and resolved no good plea. So here, though the defendant knew not of the wrongful taking of the plaintiff, yet that will not make any recompense for the wrong the plaintiff hath sustained.

2. The defendant here suffers no wrong but by his own act and will, for he was not compellable to be gaoler. And when a man takes an office, it is presumed he knows of all the conveniencies and inconveniencies which attend it. And in this, as in all other contracts, he must take the bad with the good.

3. As the gaols of the counties are incident to the office of the sheriff, 4 *Co.* 34. *a.* so the gaols of liberties are incident to the lord of the liberty. And the gaoler is but servant to him, as the gaoler of the county gaol is to the sheriff, and consequently they understand one another, and are privy to each other's acts relating to the prisoners, in presumption of law.

Object.

* *Object.* By this way a ſubſequent ſheriff may be anſwerable for the tort of his predeceſſor. * P. 424.

Reſp. So he muſt, as it hath been reſolved, for the reaſon before alledged.

2 *Cro.* 379. *Wythers* verſus *Henly*. Treſpaſs and falſe impriſonment, and detaining him for a month. The defendant juſtifies by virtue of a *Proceſs* out of the exchequer, directed to the defendant's predeceſſor, who took him by it, and alſo by virtue of a *Latitat*; and ſo the plaintiff was delivered over to the defendant. The plaintiff replies as to the exchequer *Proceſs*, there was a *Superſedeas*, and that the predeceſſor detained him after the *Superſedeas* delivered; and as to the *Latitat*, that the plaintiff in that action ordered the defendant's predeceſſor to diſcharge the now plaintiff. And upon this plea the defendant demurred; and adjudged for the plaintiff, becauſe this detaining by the now defendant is *quaſi* a new taking. And the ſubſequent ſheriff is bound to take conuſance of the acts of his predeceſſor. And it is uſual in other caſes for one man to anſwer for the acts of another.

5 *Co.* 100. *b. Penruddock*'s caſe. *Quod permittat* againſt a feoffee for a nuſance erected by his feoffor.

2 *Cro.* 373. *Rippon* verſus *Bowles*, 1 *Roll. Rep.* 222. If I have a way over the land of *J. S.* who ſtopt it, and then let it to *J. D.* for years, I may have an action againſt the leſſee, and notice is not material. 3 *Cro.* 918. *Prince* verſus *Allington*.

4. The inconvenience which would otherwiſe fall out; for the defendant ſhould be thus impriſoned, and have no remedy for the wrong, for the bailiff may be dead, or the arreſt might be by a deputy, or perſon inſolvent; and no inconvenience on the other ſide, for he may take ſecurity that he ſhall be charged with no priſoners, but what ſhall be legally committed.

* Hinchcliffe and a great many others *againſt* The Lady Beaumont. *Ebor.* * P. 425.

THE lady *Beaumont* libels in the eccleſiaſtical court of the archbiſhop of *York* againſt *Hinchcliffe*, and a very great many others named in a ſchedule affixed to the ſaid libel, and derives her title to the tithes of *Criglinton*, a vill within the pariſh of *Sandal*, under a grant from the crown of the appropriation of *Sandal magna*. The inhabitants pray Prohibition.

pray a prohibition, and join in a ſuggeſtion of a *Modus*, to pay for all tithe hay 16*s.* 6*d.* and ſo much for a cow, and ſo much for a calf, to the vicar of *Sandal magna*; and it appearing plainly that the plaintiff in the eccleſiaſtical court ought to be prohibited, the great queſtion was, Whether they may have one writ of prohibition, or whether they ought to ſever, and have ſeveral writs? And upon examination of the caſes of *Yelverton* 138. *Burges* and *Dixon* verſus *Aſhton*. *Noy* 131. 1 *Leon.* 286. *pl.* 388. Sir *Guilbert Gerard* verſus *Shering*. *Owen* 13. *Bartue's* caſe, and 106. *Wotſeley* verſus *Charnocke*, and 3 *Cro.* 472. the caſe of an *Audita Querela*, We reſolved the parties ſhould bring ſeveral writs; for ſo had been the courſe of this court formerly, and therefore we would not alter it, though ſome of the judges of the common pleas (with whom my brother *Dolben* had diſcourſed, as he ſaid) ſaid, We might grant one writ for all.

John Wilſon *verſus* Dyſon, Kipping and Davenant. *Middleſex.*

Deviſe. EJECTMENT of the demiſe of *Francis Kipping*. Upon Not guilty pleaded, a ſpecial verdict finds that *Francis Kipping* father of *Kipping*, leſſor of the plaintiff, had iſſue the ſaid *Francis Kipping*, *Thomas* one of the defendants, *Gerard*, *Anne*, *Suſan* and *Elizabeth*, and made his will in theſe words:

I give my wife all that meſſuage called the *White Hart*, together with four acres of land called *Aplands*, in the parish of *Tottenham*, &c. She one of the rents and profits thereof breeding and educating all my children. *Item*, I give to my third ſon, *Gerard Kipping*, after my wife's deceaſe, all the
* P. 426. * ſaid premiſſes, to him and his heirs for ever. *Provided always*, and upon condition, that my ſaid ſon *Gerard* ſhall pay unto my daughter *Elizabeth* 100*l.* within ſix months after my wife's death, and his age of twenty-one years; and for default of payment thereof accordingly, I give the ſaid premiſſes to my ſaid daughter *Elizabeth* and her heirs. *And farther*, my will and meaning is, That if my ſaid ſon *Gerard* happen to die without iſſue, my daughter *Elizabeth's* 100*l.* being firſt paid, then the remainder of his eſtate to be divided amongſt my ſons and daughters, and the ſurvivors of them. *And laſtly*, I make my ſaid wife executrix, to whom I give all the reſidue of my eſtate, my debts and legacies

gracies being firſt paid, deſiring her to be careful in bringing up my children.

Suſan the wife immediately after the death of the deviſor entered, and enjoyed the premiſſes during her life, and educated and maintained the children according to the ſaid will.

Afterwards the ſaid *Suſan*, and *Anne* one of the daughters, died without iſſue.

Gerard after the death of his mother entered, and had iſſue *Francis Kipping* his only ſon, and no other iſſue, and died ſeiſed before his age of twenty-one years.

Francis the ſon of *Gerard* died before the ſaid *Gerard* could have attained to the age of twenty-one years without iſſue.

Charles Dyſon, one of the defendants, in the life of the ſaid *Gerard* married *Suſan* one of the daughters of the ſaid *Francis* and *Suſan*; and *William Davenant* married *Elizabeth* aforeſaid.

The 100*l.* bequeathed to the ſaid *Elizabeth* was not paid to the ſaid *William* and *Elizabeth*, or either of them, by the ſaid *Gerard* in his life-time, or by the ſaid *Francis* his only ſon.

The ſaid *Francis Kipping* leſſor of the plaintiff, and *Charles Dyſon* in the right of his wife, and *Thomas Kipping* after the death as well of the ſaid *Gerard* as of the *Francis*, only ſon of the ſaid *Gerard*, and before the ſaid *Gerard* could have attained to his age of twenty-one years, if he had lived, did equally pay the ſaid 100*l.* to the ſaid *William* and *Elizabeth*, viz. each of them an equal proportion, and that thereupon the ſaid *Charles Dyſon* entered in right of his ſaid wife.

Thomas Kipping and *William Davenant* in right of his ſaid wife entered into the ſaid three parts.

* *Francis Kipping* leſſor of the plaintiff is heir of the ſaid *Gerard*, and of his ſaid only ſon *Francis*, and that after payment and entry laſt mentioned, he in and upon the poſſeſſion of the ſaid *Charles Dyſon*, *Thomas Kipping* and *William Davenant* did enter, and demiſed to the plaintiff, upon whoſe poſſeſſion the defendants entered; and after ſeveral arguments at the bar, it was adjudged for the defendant; for that *Gerard* had but an eſtate-tail, and by the words, *If my ſaid ſon* Gerard *happen to die without iſſue, my daughter* Elizabeth's 100*l. being firſt paid, then the remainder of his eſtate to be divided amongſt my ſons and daughters, and the ſurvivors of them*, the teſtator intended that all his eſtate in the * P. 427.

the lands ſhould be divided amongſt his ſons and daughters, taking out thereof only 100*l.* for his daughter *Elizabeth*, which ſhe ſhould have over and above her proportion of the ſaid lands.

Brown *verſus* Cutter. *Ejectment. Special Verdict.* Surry.

Deviſe. 2 Show. 152.

JOHN CHEEK had iſſue four ſons, *Humphry*, *Robert*, *Anthony* and *John*, and 6 *March* 1589. 32 *Eliz.* made his will in writing thus:

Firſt, I will that my wife ſhall have and enjoy all my houſes, &c. in *Thames Ditton* during her natural life, if ſhe do not marry; but if ſhe do marry, then I will that my ſon *Humphry* ſhall preſently after his mother's marriage enter and enjoy the ſaid premiſſes, to him and the heirs male of his body, and for default of ſuch iſſue, to my ſon *Robert* and the heirs male of his body, with remainders to his other ſons, and ſo over to ſtrangers.

21 *October* 1590. *John Cheek* the teſtator dies, his wife *Iſabel* enters, and 20 *Auguſt* 1597, dies. *Humphry Cheek* enters, and hath iſſue two ſons, *viz. William* his eldeſt, and *Robert* his ſecond, leſſor of the plaintiff.

14 *June* 1632, *Humphry* died ſeiſed, and *William* entered, and became ſeiſed *prout lex*, and had iſſue *John*, and *Mary* wife of *Benjamin Cutter* the defendant.

14 *September* 1661, *John* died without iſſue before his father.

18 *June* 1677, *William Cheek* died ſeiſed, *Mary* entered.

July 1677, *Robert Cheek* leſſor of the plaintiff entered.

* P. 428. * And judgment was given for the plaintiff; and our opinions were delivered by my brother *Jones*. The reaſons of my opinion were as follow.

1. The intention of the deviſor being the pole-ſtar that ought to guide the judges in the expoſition of all wills, 'tis neceſſary to conſider, what eſtate the teſtator intended for his wife by his will. And I am of opinion, that he intended her an eſtate only *durante viduitate*, which the lord *Coke* ſays, *Co. Lit.* 42. *a.* is in judgment of law an eſtate for life determinable, and in pleading the grantee ſhall ſay that by virtue thereof he was ſeiſed for life; which being premiſed, the queſtion will be, Whether by the will ſhe hath an eſtate *durante viduitate?* The words whereof are, *I will that my wife ſhall have and enjoy all my houſes, lands, &c. during her natural life, if ſhe do not marry*; and I do conceive they

they are so much and no more; for what is an estate during widowhood, but an estate to continue till she doth marry? And such an estate is not tied up to the words, *durante viduitate*, as exchange, warranty, frankmarriage, frankalmoign, &c. but any description thereof will satisfy; which being so, then the words, *But if she do marry after my death*, is no more than, in case the estate shall determine, *then I will that my son* Humphry *shall presently enter*, &c. by which it is most plain, that here is no contingent remainder, but an estate vested in *Humphry* to take effect in possession upon the marriage or death of the wife.

2. That the intent of the devisor was such, appears by the limitation; for he intended that the lands should go to his sons, and their issues male, and not to the females, which would not be, if this should be a contingent remainder; and such intention hath been in all ages regarded, in esteeming of issue male. 1 *Reg.* 21. 21. *Interficiam de Achab mingentem ad parietes*, *Plowd.* 305. Now this intention would not be attained without much improbability. 1. Because of the age of the wife, for she had four sons at the time of making this will, and her great grandson was born within less than forty years afterwards, as appears by the record, and so she could not be very young, and consequently not inclinable to marry. 2. By her marriage she would lose this estate, which for aught appears by the record, was all her subsistence, both which were sufficient restraints of her marrying again without which the testator's intent would not be completed.

Object. It hath been objected, That the meaning of the testator could not have been expressed more plainly for a contingent * remainder, that *Humphry* should have a fee- * P. 429.
simple if his wife did not marry.

Resp. It might have been much more plainly expressed, to have said, *If she do not marry, living Humphry, Then*, &c. as *Pell* and *Brown*'s case was, or by a more large description of all the circumstances of his intention.

Object. By this construction the eldest son would have less power of his estate than the younger, if his mother had survived him, because he could not have made an estate in fee by a recovery.

Resp. That disability arises not from the estate given, but from the collateral accident of the mother's surviving, and so it is in all vested remainders where is a tenant for life in being; and here the mother might have survived all the remainders.

As

As for authorities, though they cannot be expected in case of a will to be very direct, yet to me these seem pretty apposite, *viz.*

Moor 486. *pl.* 686. *Holcroft*'s case, sir *John Holcroft* seised in fee, covenants to levy a fine to the use of himself for life, the remainder to his son sir *John* for life, until he attempt to alien, and then to *Hamlet Holcroft*, during the life of sir *John, jun.* the remainder to sir *John* the younger's first, second, third and fourth sons successively, and the heirs male of their respective bodies, the remainder to the said *Hamlet* in tail male. Sir *John, sen.* dies, sir *John, jun.* had only one son, who dies, and then sir *John* the younger dies. *Resolved.* 1. That *Hamlet* had an estate in remainder presently. 2. Though sir *John* the younger had but one son, yet the remainder in tail vested in possession in *Hamlet* after the death of the said sir *John* the younger without issue.

2 *Cro.* 696. *Jones* 56. *Fox* versus *Hinde*. *Martin Keilway* seised in fee, gives his lands, after his death without issue male, to *Henry Keilway* in tail male, until he or they make any acts to alter or discontinue this estate-tail, and then to *Thomas Keilway* and the heirs male of his body, with several remainders over. The deviser dies without issue, *Henry* enters, *Thomas* dies leaving issue *Richard*, *Henry* levies a fine, *Richard* enters. It was objected, that *Richard* could not enter, because the remainder devised to his father was contingent, *viz.* to arise upon *Henry*'s alienation of the estate, and not before, and then *Thomas* dying before the contingent happened, the remainder could not vest. But resolved, The remainder to *Thomas* was not contingent, but
* P. 430. an immediate * devise, because, should it be contingent, the deviser's intent would be destroyed, which was that every one in remainder, successively, should enjoy the land; and so in the case at bar; and judgment was given by the whole court, except *Scroggs* chief justice, who was absent, and sate not at any time this whole term.

Memorand. 12 February, being the last day of this term, sir *Creswell Levinz*, attorney general, was made serjeant, and gave rings, *Cujus inscriptio fuit*, *Regi fervire*, *Jura servare*. He kept his feast in the hall of *Serjeants Inn* in *Chancery-Lane*, where was no nobleman but the lord privy seal, earl of *Anglesey*. His coif was put on, and he counted in the treasury of the *Common Pleas*, so soon as he was sworn at the *Chancery Bar*; and the lord chief justice *North* first to

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the judges of *B. R.* to be preſent; but our buſineſs would not permit us.

Memorand. 23 *March*, ſir *Richard Weſton* knt. puiſne baron of the *Exchequer*, died at his houſe in *Chancery-Lane*.

Berning *verſus* Follat. *Midd.*

DEBT upon an obligation, conditioned to pay money upon the plaintiff's delivering over to the defendant ſome receipts which would effect infallible cures of the pox, and other diſeaſes. The defendant pleads, that the plaintiff did not deliver over the ſaid receipts; which plea upon demurrer was ruled naught, and judgment ſeemed to be for the plaintiff; and then an exception was ſtarted, That the action is brought in *Middleſex*, and the bond itſelf, as appears upon the record, is dated in *London*. And *Coke* upon *Littleton* 6. *a.* The putting of a place for the date of the deed is diſadvantageous to the feoffee; for being in general, he may alledge the deed to be made where he will; by which is to be collected, That if the place be added, he cannot alledge it to be made in any other place than where it is alledged. *Et adjournatur. Vide Bro. Debt* 46. *Faits* 95. *Obligation* 97. 48 *E.* 3. 2, 3. Lien.

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* Term. Paſch. 33 Car. 2. B. R. * P. 431.

Johnſon *verſus* Taylor.

ERROR in *Boſton* to reverſe a judgment given there upon a *Scire facias* grounded upon a recognizance entered into by the defendant, as bail for one *Townſend* at the ſuit of the plaintiff. The court of *Boſton* do certify not only the judgment upon the *Scire facias*, but alſo the principal judgment, and all proceedings therein; and reſolved good Error.

good enough, becauſe, if they ſhould certify only the judgment in the *Scire facias*, it could not well be underſtood by this court, becauſe in inferior juriſdictions there are not ſeveral rolls to enter the judgment for the principal, and another for the *Scire facias*, and another for bails; but all proceedings as well againſt defendants as againſt the bail are entered (for the moſt part) in a book, and never entered at large unleſs when a writ of error is brought, and then they make up an entire record, and not otherwiſe; and judgment was affirmed.

Memorandum, *April* 23, 1681, 33 *Car.* 2. ſir *Thomas Street* knight, ſerjeant at law, was ſworn one of the barons of the *Exchequer* in the place of ſir *Richard Weſton* deceaſed, and ſir *Robert Wright* knt. ſerjeant at law, was ſworn chief juſtice of *Glamorgan* circuit in *South Wales*, in the place of ſerjeant *Street*.

Mandamus. Trem. 454.

A MANDAMUS was directed to *William Stephens*, *gent.* mayor of the borough of *Saltaſh* in the county of *Cornwal* to ſwear *Mathew Veal* into the place and office of mayor of the ſaid borough being duly elected, *Ret. die ſabbati prox. poſt menſem Michaelis.* The ſaid *Stephens* returns thus, *viz.* Quod ante adventum hujus brevis mihi direct. necnon ante emanationem ejuſdem brevis, ſcilicet, 29 September 32 Car. 2. Ego præd. Williemus Stephens a loco & officio Majoris Burgi de Saltaſh in Com. Cornub. præd. amotus fui. Et quidam Andreas * Willoughby Gen. exiſten. un. Aldermannor' & liberorum Burgenſ. Burgi præd. eodem 29 die Septemb. anno ſupradicto in loco & officio Majoris Burgi de Saltaſh in Com. præd. elect. conſtitutus admiſſ. & jurat. fuit. Ac deinceps hucuſq; fuit & adhuc eſt Major Burgi præd. & ratione officii ſui a tempore conſtitutionis & admiſſionis ſuæ præd. ad officium illud hucuſq; habuiſſet & modo habet in cuſtodia ſua commune ſigillum Burgi de Saltaſh præd. ratione cujus ego præd. Willielmus Stephens ipſum præd. Matheum Veal ſecundum exigentiam brevis præd. jurare ſeu admittere non potui. And reſolved by the whole court, that this return is inſufficient, becauſe it doth not anſwer the giſt of the writ; for by ſuch a return any officer may be kept out, for the party may procure another to be choſen before the party elected can procure a writ; and therefore the defendant ought to have returned, that *Veal* was never elected, and ſo *Veal* might have had an action for his falſe return; and ſo the court awarded a new writ to *Stephens* to ſwear and admit the ſaid *Veal*.

* P. 432.

By

By the act of 13 & 14 *Car.* 2. *cap.* 2. concerning the repairing the highways about *London* and *Weſtminſter*, which is now expired, It was enacted, *Sect.* 11. *In caſe any perſon ſhall propoſe to carry away the aſhes, dirt, and other filth, for all or any of the places aforeſaid, at leſs rates than the yearly raker or undertaker can or will perform the ſame, the ſaid commiſſioners ſhall have power, and are hereby authoriſed to contract with ſuch perſon, and for ſuch term as they ſhall think fit*; the ſaid commiſſioners by deed poll under their hands and ſeals did diſpoſe to *Windſor Sandys*, eſq; the employment of raker, or general undertaker, for cleanſing of the ſtreets, lanes and other open paſſages of each ward and diviſion within the pariſh of St. *Giles* in the *Fields*, and St. *Martin in the Fields* in *Middleſex*, for the term of 21 years, of which term eleven years being expired, *Windſor Sandys* died, and his intereſt veſted in his wife, who not being able to manage the ſaid employment, invited *Thomas Row*, eſq; to take it from her, and to buy out her intereſt, which he refuſed to do, without the conſent of the ſaid pariſhes; and thereupon he addreſſed himſelf to them, and acquainted the inhabitants of the ſaid pariſh of St. *Giles in the Fields* with it at a general veſtry, (whereof *Whitcomb* was one) who unanimouſly aſſented to *Row*'s perfecting an agreement with the widow *Sandys*, and made an order of veſtry for continuance of ſuch their agreement with the ſaid * *Row*, as they had before done with the ſaid *Windſor Sandys*, and thereupon *Row* bought the widow *Sandys*'s ſtock of horſes and carts, to the value of 1000*l.* and entered upon the employment, and afterwards *Whitcomb* procured another veſtry in the ſaid pariſh, and there obtained an order contrary to the former, *viz.* That *Whitcomb* ſhould have the employment, and cauſed the money raiſed by virtue of the ſcavengers rate to be ſtopped in the ſcavengers hands; and thereupon *Row* made application to the juſtices of the peace at the quarter-ſeſſions, who ordered a reference to ſeven of them, who reported to them as is before-mentioned, and the court ordered that the money ſhould be brought to the clerk of the peace, and *Row* to proceed in the ſaid employment, and that the money be paid over to *Row*. Upon this *Whitcomb* obtained a *Certiorari*, and removed the order into this court, and upon opening of it, we were all of opinion, That the order was not good in law, becauſe the juſtices of peace have nothing to do with contracts; but it ſeems probable, that the contract and leaſe made by the commiſſioners at *Scotland-yard* was good to *Sandys*, and went to the widow, and by her might be transferred to *Row*;

* P. 433.

Row; but we determined not that point, but referred the buſineſs to ſir *Robert Sawyer* knight, attorney general, to end it, if he can, becauſe the way of managing the cleanſing the ſtreets by ſuch undertaking hath been very convenient; and we underſtood that *Whitcomb* was a man of ſmall ability to carry on an employment of ſo great charge; and in the mean time the order to remain unquaſhed.

Phorbes's *Caſe*.

Errors. 3 Danv. Ab. 3. p. 5. 2 Show. 160.

JAMES PHORBES of the city of *Glouceſter* gent. was indicted before the juſtices of peace in this manner, Civit' Glouc'. ſſ. Memorand' quod ad generalem Seſſion' Pacis tent. apud Civit' Glouc' in Com' ejuſdem Civit' 13 die Januarii anno Regni Domini Car. 2. &c. 30. coram Johanne Wagſtaffe Arm' Duncomb Colcheſter Mil' &c. Juſtic' ipſius Domini Regis ad Pacem in Com' Civit' præd' conſervand' necnon ad diverſ. felon' tranſgr. & alia malefacta in eadem Civitate perpetrat' audiend' & terminand' aſſign' per Sacramentum Franciſci Singleton &c. bonorum & legalium hominum ad inquirend' pro dicto Domino Rege et pro corpore Com' præd' jurat' & onerat' præſentat' exiſtit quod
* P. 434. Jacobus Phorbes de Civit' Glouc' Gen' * 1 die Januarii 30 Car. 2. apud Civit' Glouc' præd' fuit ætat' ſexdecim annorum & amplius ac non acceſſit, *Anglice did not repair*, Eccleſiæ Parochiali de Sancta Maria de Cript' infra Civit' præd' nec alicui alii Eccleſiæ Capellæ aut uſuali loco Communis precation' nec ibidem fuit tempore Communis precationis ad aliquod tempus infra ſpatium ſex menſium integrorum extunc prox' ſequen' ſed abſtinuit ab eiſdem, *Anglice hath forborn the ſame*, per ſpatium præd' in malum aliorum exemplum contra Pacem dicti Domini Regis nunc Coronam & Dignitatem ſuas &c. necnon contra formam ſtatuti in hujuſmodi caſu nuper edit' & proviſ. Et ſuper hoc facta hic in eadem Curia publica proclamatione pro Domino Rege ſecundum formam ſtatuti quod præd' Jacobus Phorbes corpus ſuum redderet Vicecomitibus ejuſdem Civitat' ante prox' generalem quarterial' ſeſſion' tenend' pro Civitat' præd' Ante quam quidem general' quarter' ſeſſion' ſcilicet 28 die Aprilis exiſten' prox' general' ſeſſion' tunc tent' pro Civitate præd' poſt proclamation' ſic ut præfertur fact' præd' Jacobus Phorbes corpus ſuum Vic' Civit' præd' non reddidit nec comperuit ſecundum formam & effectum cujuſdam ſtatuti in ea parte edit' & proviſ. ſed defalt' fecit unde idem Jacobus Phorbes convict' eſt.

Upon

Upon this conviction, *Phorbes* brought a writ of error; and although the conviction was very vitious and erroneous, yet it being no judgment a writ of error doth not lie thereof; for the ſtatute of 3 *Jac. cap.* 4. ſays, That after proclamation made, and upon every default recorded, the ſame ſhall be as ſufficient a conviction in law of the ſaid offence, as if upon the ſame indictment a trial by verdict thereupon had proceeded and been found againſt him or her and recorded; ſo that this is no judgment, but the ſtatute gives proceſs upon it for the forfeiture; and the party's remedy is in the exchequer to quaſh it there. The faults in the record are, 1. The ſeſſion is held 13 *January* 30 *Car.* 2. and the party is indicted at that ſeſſions for not coming to church from 1 *January* 30 *Car.* 2. for ſix months, which is all but thirteen days after the ſeſſions held, and ſo impoſſible. 2. The indictment is *per ſacramentum bonorum & legalium hominum*, but not *Com' præd'*, both which were held faults to have quaſhed the indictment, but not without firſt conforming, as that ſtatute of 3 *Jac.* requires; and *Phorbes* was left to have his remedy in the exchequer.

* Haddock's *Caſe*. * P. 435.

Corporation. 1 Vent. 355. Trem. 523.

TIMOTHY HADDOCK brought a *Mandamus* directed to the mayor, aldermen, bailiffs and citizens of the city of *Carliſle*, to reſtore him to the place and office of one of the aldermen of the ſaid city, who returns as follows, *viz.*

That the city of *Carliſle* is, and time out of mind hath been an ancient city, and that the citizens of the city aforeſaid for the time being, time out of mind until 21 *July* 13 *Car.* 1. were incorporated in the name of mayor and citizens of the city of *Carliſle*, and that always to that time there were within the ſaid city twelve of the moſt ſufficient citizens of the ſaid city for the time being, who were named *conſiliarii, alias Aldermanni, Civitatis præd'*, and out of which one yearly was duly choſen, and ſworn in the office of mayor of the ſaid city for one whole year next following ſuch election, and farther till one other of the twelve counſellors, otherwiſe aldermen aforeſaid, ſhould be choſen and made, and ſworn mayor; and that every one of the ſaid counſellors, *alias* aldermen, after that he ſhould be choſen and ſworn into the ſaid office of counſellor, *alias* alderman, ſhould continue therein during his life, if he ſhould ſo long well behave himſelf.

That from time out of mind, till the ſaid firſt day of *July* 13 *Car.* 1. there were, and uſed to be other thirty-two good and ſufficient citizens of the ſaid city *e Gilda Mercatoria* there choſen, which together with the ſaid other eleven counſellors, *alias* aldermen, not being mayor, were and uſed to be the common council of the mayor and citizens of the ſaid city.

That king *Charles* the Firſt by his letters patent under the great ſeal of *England*, dated at *Canterbury* 21 *July* 13 *Car.* 1. did will, ordain, conſtitute and grant, that the ſaid city from thenceforth ſhould be a city of itſelf, and that the ſame ſhould be from thenceforth incorporated by the name of mayor, aldermen, bailiffs and citizens of the ſaid city of *Carliſle*.

That from thenceforward for ever there ſhould be within the ſaid city, one of the aldermen for the time being, who ſhould be named mayor of the ſaid city, and eleven beſides the ſaid mayor, who ſhould be called aldermen, and two others of the ſaid city, which ſhould be called bailiffs, two other diſcreet men to be choſen, who ſhould be called coroners of the ſaid city, and four and twenty other men which ſhould be called *Capitales Cives* of the ſaid city, and ſhould
* P. 436. be of the common council; * and ſhould be aiding the ſaid mayor, aldermen and bailiffs for the time being.

That the ſaid mayor, aldermen, bailiffs, and 24 *Capitales Cives*, or the greater part of them, whereof the mayor to be one, upon publick ſummons by the ſaid mayor to be made, ſhould in the *Guildhall* have power to make orders and by-laws for the good government of the city, and to have all amerciaments and forfeitures thereby ariſing for their own uſe; and the king appoints *Richard Barewiſe* eſq; to be the firſt mayor, to continue ſo till *Monday* next after *Michaelmas Day* following, and from thence till another out of the ſaid eleven aldermen ſhould be choſen, if he ſhould ſo long live; and the king likewiſe appoints eleven others by name to be aldermen, to continue in the ſaid office during their natural lives, unleſs in the mean time for ill government, or for any reaſonable cauſe by the mayor, aldermen, bailiffs and *Capitales Cives* for the time being, or the greater part of them, whereof the mayor to be one, he ſhould be amoved. He alſo appointed two bailiffs by name to continue till *Monday* next after *Michaelmas*, and from thence till others ſhould be choſen, if they ſhould ſo long live, unleſs in the mean time they ſhould be amoved for ill government, or any other reaſonable cauſe. In like manner he appointed two coroners by name, and alſo twenty-four common-council

all men to continue ſo during their natural lives, unleſs amoved for ill government, or for any other reaſonable cauſe by the mayor, aldermen and chief citizens, or the greater part of them.

That the mayor, aldermen, and twenty-four *Capitales Cives*, or the greater part of them, without the aſſiſtance or help of other citizens might every year on *Monday* next after *Michaelmas Day* in the *Guildhall*, chuſe one of the ſaid aldermen to be mayor of the ſaid city; and if the number of the chooſers ſhall be equal, then the mayor to have a double voice.

That the mayor ſo choſen ſhall be ſworn before his predeceſſor, if living, and if dead, before the aldermen, or greater part of them in the preſence of the aldermen, bailiffs, and twenty-four, or ſo many of them as ſhall be preſent.

That after he ſhall be ſo ſworn, he ſhall continue a year, or until another ſhall be choſen and ſworn in his place.

That the ſaid mayor, aldermen, bailiffs, and twenty-four ſhall on *Monday* next after *Michaelmas Day* chooſe two bailiffs yearly out of the citizens, who ſhall be ſworn before the mayor, and other aldermen, and 24, and ſhall hold their places a year, and until others ſhall be choſen and ſworn into their places.

That if the mayor ſhall die within the year, then the * P. 427. aldermen, bailiffs, and twenty-four, or the greater part of them, ſhall chooſe one of the aldermen to be mayor, and ſhall continue ſo for the reſidue of the year, and till another ſhall be choſen, to be ſworn before two aldermen; and if any of the ſaid aldermen for the time being ſhall die, then the mayor and ſurviving aldermen, or the greater part of them, ſhall chooſe others in their places to be ſworn before the mayor to continue ſo during his life.

That if the bailiffs, or either of them ſhall die, or be amoved within the year, then the mayor, bailiffs, and twenty-four, or the greater part of them, ſhall chooſe another out of the citizens of the ſaid city, to continue during the reſidue of the ſaid year; and if any of the twenty-four ſhall die, or be amoved, then the mayor and aldermen, or the greater part of them, ſhall chooſe others *de magis probis & diſcretis Civibus* into his place. The king alſo granted that the ſaid mayor, aldermen, bailiffs and citizens ſhould have a recorder, and named one to continue during the pleaſure of the mayor, aldermen, &c. *prout per Literas Patentes (inter alia) apparet.*

That from time out of mind, to the time of making the ſaid letters patent quilibet Conſiliarius, alias Aldermannus, Civitat. præd. pro tempore exiſten. pro juſta & rationabili cauſa fuit amobilis & amot. a loco & officio ſuo Conſiliarii, alias Aldermanni, dictæ Civitat. per Majorem Conſiliarios, alias Aldermannos, Civitat. prædictæ pro tempore exiſtens. vel majorem partem eorum quorum Major pro tempore exiſtens fuit unus. Et poſt confection. Literarum Patent. præd. quilibet Aldermannus ejuſdem Civitat. pro tempore exiſten. *by the mayor and aldermen of the ſaid city for the time being, or the greater part of them, of which the mayor was one*, ob juſtam & rationabilem cauſam ab officio ſuo Aldermanni Civitat. præd. amobil. & amot. fuit & eſſe conſuevit.

That the ſaid *Timothy Haddock* 2 *October* 1673. was choſe alderman, and took his oath well and faithfully to execute the ſaid office to the effect following, *viz.*

Quod adviſament. adjument. & conſenſus ipſius Timothei forent per ipſum dat. & loquut. ad omnia tempora extunc ad & cum majori parte Majoris & Conſiliariorum Civit. præd. pro bona gubernatione & incremento boni publici ejuſdem non reſpicien. aliquod propr. lucrum vel queſtum pro ſeipſo vel aliqua alia perſona in præjudicium opum, Anglice *of the wealth*, libertatis vel libertatum bonorum ordinum conſtitutionum vel conſuetudinum ejuſdem Civitat.
* P. 438. quodq; non detegeret ſeu pateſaceret * Anglice *diſcloſe or diſcover*, alicui perſonæ vel perſonis ad aliquod tempus aliqua verba locutionis, Anglice *talks*, Communicationes vel Sermones mot. dict. vel audit. per ipſum vel aliquos ſocios Conſiliarios ſuos aſſemblat. inſimul in aliquo loco ad conſulend. pro opibus, Anglice *the wealth*, vel bona gubernatione Civitat. præd. & condeſcenderet & agrearet ad omnes tales cauſas & materias quales Major & major pars ſocior. Conſiliar. dicti Timothei ad inde agrearent, ac etiam ad ulteriùs poteſtatem ſupprimeret omnes tales perſonas quales conarentur facere aliquas factiones, Anglice *factions*, conſpirationes vel aliquam confuſionem, Anglice *diſorder*, contra bonam gubernationem & conſtitutionem dictæ Civitat'.

That one *Thomas Jackſon* being mayor, 6 *October* 31 *Car.* 1. a common council was held in the *Guildhall* of the city for the election of a mayor for the year enſuing, at which the ſaid *Haddock* was preſent, who being then about to depart, the ſaid mayor ſpoke to him, and requeſted him not to depart from the ſaid council before the election made, but ſhould attend the election according to his duty, and that the ſaid *Haddock* inſtantly, contemptuouſly, and without any reaſonable cauſe departed from the ſaid council,

and

and afterwards the ſame day before the ſaid election made came back again leading thither with him divers perſons to the number of ſixty of the inferior citizens of the ſaid city, not having voices in the ſaid election, to diſturb the ſaid election, and there did *tumultuoſe, riotoſe & minaciter* require the ſaid mayor, aldermen, bailiffs, and capital citizens then aſſembled, that he and the perſons he brought with him might together with the ſaid mayor, aldermen, bailiffs and capital citizens ſo aſſembled as aforeſaid, chooſe a mayor, contrary to the form and effect of the ſaid letters patent, ſaying, and with a great noiſe clamouring and alledging the ſaid letters patent concerning the election aforeſaid to be void, to the great terror of the ſaid mayor, aldermen, bailiffs and capital citizens ſo aſſembled as aforeſaid; and the ſaid *Timothy Haddock*, and all other the perſons aforeſaid, and by him brought with him at and by the inſtigation and procurement of the ſaid *Timothy*, then and there in the preſence of the ſaid mayor, bailiffs and capital citizens for the cauſe aforeſaid aſſembled, did ſo diſturb the ſaid mayor, aldermen, bailiffs and capital citizens with threats, complaints and clamours, that they durſt not, nor could not, proceed in the ſaid election for the ſpace of two hours; and therefore afterwards, *viz.* 25 *October* then next following * in a council held in the *Guildhall* aforeſaid before * P. 439.
the ſaid *Thomas Jackſon* then mayor of the ſaid city, and the greater part of the aldermen of the city aforeſaid, it was ordered by the ſame mayor and aldermen then and there preſent, that the ſaid *Timothy* ſhould be ſummoned to be at a common council of the ſaid mayor and aldermen in the *Guildhall* aforeſaid, 8 *November* then next following to be held, to anſwer concerning his miſbehaviour aforeſaid, and to ſhew cauſe why he for the ſaid miſdemeanor ſhould not be amoved from the place and office of alderman of the ſaid city, at which ſaid council the ſaid *Timothy* appeared, and being ſpoke to by the mayor if he had any thing to ſay in excuſe of the premiſſes, or could ſhew any cauſe why he ought not to be amoved from the office of alderman of the ſaid city, ſaid nothing in excuſe of his ſaid miſbehaviour, nor ſhewed any cauſe why for his ſaid offence he ſhould not be amoved from his ſaid office; and thereupon the ſaid *Thomas Jackſon* then mayor, and the ſaid greater part of the ſaid aldermen then preſent, did amove the ſaid *Timothy Haddock* from his ſaid office of one of the aldermen of the ſaid city, and did declare him to be ſo amoved; and for that cauſe they cannot reſtore him. And we all held this return good; for though by the charter of

13 *Car.*

13 *Car.* 1. there is no power given for the corporation to remove an alderman, yet when the *conſiliarii, alias aldermanni*, were before the ſaid charter removeable for reaſonable cauſe, the ſame power ſtill remains, for that the charter doth not merge or extinguiſh any of the ancient privileges; but the corporation may uſe them as before; and if it ſhould be otherwiſe it would be very miſchievous for moſt of the corporations in *England*, who have taken new charters, but were ancient corporations before.

Carpenter's *Caſe*.

Churchwarden.

A MANDAMUS iſſued out of this court to ſir *Thomas Exton* knight, commiſſary to the dean and chapter of St. *Paul's London*, to ſwear *Edward Carpenter* one of the churchwardens of the pariſh of *Stoke-Newington* in *Surrey*, he being thereto duly elected. But the doctor finding that there is a queſtion between the parſon and the pariſhioners concerning the election of the churchwardens, the parſon claiming to appoint one by virtue of the canon, and the pa-
* P. 440. riſhioners claiming a cuſtom to chooſe both, makes * this ſpecial return to ſave himſelf from contempt, and alſo harmleſs from being liable to an action for a falſe return, *viz.*

Quod cauſa ſive querela coram nobis nunc pendet indeciſa inter Sidracum Simpſon Clericum, Rectorem de Stoke-Newington in Com. Midd. & Franciſcum Staunton Parochian. dictæ Parochiæ & Guardian. per dictum Simpſon (ut aſſeruit) electum ex una parte & Edwardum Carpenter & Thomam Terrey Gardianos per Parochianos dictæ Parochiæ (ut aſſeruerunt) electos & alios Parochianos dictæ Parochiæ ex altera parte, in qua quidem cauſa differentiæ Simpſon Rector allegavit ſe ſecundum Canonem in ea parte edit. & proviſ. dictum Franciſcum Staunton elegiſſe in un. Gardianorum dictæ Parochiæ quia ſe præfat. Rectorem & Parochianos prædictos diſſent. in electione Gardianorum ejuſdem Parochiæ & Parochiani præd. allegarunt ſe ſecundum conſuetudinem antiquam ejuſdem Parochiæ eligendi ambos Gardianos elegiſſe dictum Edwardum Carpenter & Thomas Terrey in Gardianos dictæ Eccleſiæ quam conſuetudinem dictus Rector negabat & deſuper dicti Parochiani in ſe ſuſceperunt ad proband. dictam conſuetudinem & deder. allegation. in ſcript. concept. quam nos admiſimus. Et teſtes fuiſſe per dictos Parochianos product. & jurat. ad proband. dictam conſuetud. & tempus eis aſſignat. ad eand.

proband.

proband. ſed dictos Parochianos neglexiſſe examinare & non adhuc examinaſſe dictos teſtes & dictum Rectorem virtute Juramenti ſui negaſſe dictam conſuetudinem, ſed quamprimum Parochian. probaverint dictam conſuetudinem nos erimus prompti & parati ad pronunciand. pro jure dictorum Parochianorum Et nos inſuper humiliter certificamus unum e dictis Gardianis per dictos Gardian. elect. juramento oneravimus de fidelit. exequend. officium Gardian. dictæ Parochiæ. In cujus rei teſtimonium, &c. And we granted a writ to ſwear *Carpenter*, becauſe the eccleſiaſtical court cannot try the cuſtom of chooſing the churchwardens, as is alledged 2 *Roll. Ab.* 287. *F. pl.* 51. *Shirley* verſus *Brown*.

Englefield *and* Smith's *Caſe*.

MIDD. Berks ſſ. Alias ſcilicet die Lunæ proxim' poſt Craſtinum Aſcenſionis Domini ult. præterit. coram Domino Rege apud Weſtm. per ſacramentum 12 Jur. proborum & legalium hominum Com. præd. qui adtunc & ibidem jurat. & onerat. exiſt. ad inquirend. pro dicto Domino Rege & corpore Com. præd. præſentat. extitit quod Richardus Harriſon * Miles & Valentin. Croome Arm. Juſtic. Domini Regis nunc ad pacem ſuam in & pro Com. Berks conſervand. aſſign. virtute Commiſſionis dicti Domini Regis ſub magno ſigillo ſuo Angliæ eis direct. ad requirend. & recipiend. ſacramentum Primaciæ, communiter vocat. *the Oath of Supremacy*, in quodam Statut. fact. in anno primo Elizabethæ nuper Reginæ Angl. inactitat. & ſpecificat. de omnibus & ſingulis ſubditis dicti Domini Regis Romanæ ſuperſtitionis ſectatoribus ſive talit. reputat. 8 die Febr. anno 31 Car. 2. apud Reading in Com. præd. ſacramentum præd. Henrico Englefield de Englefield in Com. Berks præd. Arm. Franciſco Perkins de Uſton in Com. præd. Arm. Richardo Perkins de Beenham in Com. præd. Gen. Nathaniel Smith de Woolhampton in Com. Berks præd. Gen. & Willielmo Stone de Southcot in Com. præd. Yeoman exiſten. & quilibet eorum exiſten. ætat. 16 annorum & amplius & ſubdit. dicti Domini Regis Romanæ ſuperſtitionis ſectatoribus exiſten. & tunc commoran. & cuilibet eorum adtunc commoran. infra præd. Com. Berks obtulerunt & ſacramentum præd. præſtare & recipere requiſiver. Et quod Henricus Englefield Franciſcus Perkins Richardus Perkins Nathaniel Smith & Willielmus Stone ſacramentum Primaciæ præd. communiter vocat *the Oath of Supremacy*, adtunc & ibidem præſtare & recipere

Oath.

* P. 441.

& recipere penitus recuſaver. & quilibet eorum recuſavit in contempt. dicti Domini Regis nunc & legum ſuarum contra formam Statuti in hujuſmodi caſu edit. & proviſ. ac contra pacem dicti Domini Regis nunc Coron. & Dignitat. ſuas, &c.

Per quod præcept. fuit Vic. quod non omitt. &c. quin Venire fac. eos ad reſpondend. &c. Et modo ſcilicet die Veneris proxim. poſt Craſtinum Sanctæ Trin. iſto eodem Termino coram Domino Rege apud Weſtm. ven. præd. Henricus Englefield & Nathaniel Smith per Robertum Seylyard Attorn. ſuum Et habit. audit. indictament. præd. ſeparatim dicunt quod ipſi non ſunt inde culpabiles Et de hoc ſeparatim pon. ſe ſuper patriam Et Samuel Aſtry Arm. Coron. & Attornatus Domini in Cur. ipſius Regis coram ipſo Rege qui pro eodem Domino Rege in hac parte ſequitur ſcilicet, &c. Ideo præcept. eſt Vic. Berks quod Venire fac. coram dicto Domino Rege a die Sanctæ Trinitatis in tres ſeptimanas ubicunq; &c. 12 &c. de viſn. de Reading præd. per quos, &c. Et qui &c. ad recogn. &c. quia tam &c. Idem dies datus eſt tam præfat. Samueli Aſtry qui ſequitur, &c. quam præd. Henrico Englefield & Nathaniel Smith, &c. Ad quas quidem tres ſeptimanas Sanctæ Trinitatis coram dicto Domino Rege apud Weſtm. ven. tam præfat. Samuel Aſtry Arm. qui ſequitur quam præd. Henricus Englefield &
* P. 442. Nathaniel Smith per * Attorn. ſuum præd. Et Vic. Com. Berks præd. retorn. nomina 12 Jur. quorum nul. &c. And then a *diſtringas*, and a jury returned and impanelled find a ſpecial verdict by *Niſi prius* in *Berkſhire*, to this effect, *viz.*

That the ſaid Sir *Richard Harriſon* and *Valentine Croome* by virtue of a commiſſion under the great ſeal of *England*, dated 23 *November* 30 *Car.* 2. and long before, and ever ſince were, and yet are juſtices of the peace of the county of *Berks*.

That the king granted a commiſſion dated 23 *November* 30 *Car.* 2. *in hæc verba. Carolus Secundus, &c. omnibus & ſingulis cuſtodibus pacis Com. noſtri Berks ſalutem. Sciatis quod dedimus vobis & aliquibus duobus vel plur. veſtrum poteſtatem & authoritatem requirendi & recipiendi ſacramentum, communiter vocat.* the Oath of Supremacy, *ſpecificat. in quodam ſtatuto* 1 *Eliz. fact. Ac etiam ſacramentum, vulgariter vocat.* the Oath of Obedience, *ſpecificat. in quodam altero ſtatuto* 3 *Jac. fact. de omnibus & ſingulis ſubdit. noſtris Romanæ ſuperſtitionis ſectatoribus ſive tal. reputat. Anglice* Popiſh Recuſants or ſo reputed, *de quibus ſeparal. ſacrament. præd. vigore ſtatut. præd. a virtute hujus noſtræ commiſſionis ullo modo reſpective requirantur*

requirantur & recipiantur in aliquo loco in dicto Com. noſtro Berks commorantibus. Et ideo vobis firmit. mandamus quod in & circa præmiſſa reſpective diligent. intendatis. In cujus rei teſtimonium, &c.

That the ſaid Sir *Richard Harriſon* and *Valentine Croome* afterwards, *viz.* 13 *March* 31 *Car.* 2 *Honorabili Willielmo Scrogs Mil. Capital. Juſtic. Domini Regis ad placita coram ipſo Rege tenend. aſſign. & aliis ſociis ſuis Juſtic. dicti Domini Regis ad placita coram ipſo Rege tenend. aſſign.* did certify, that the defendants refuſed to take the ſaid oath, which certificate follows in theſe words.

* Com. Berks ſſ. Honorabili Willielmo Scrogs Mil. Capital. Juſtic. Domini Regis ad placita coram ipſo Rege tenend. aſſign. & aliis ſociis ſuis Juſticiariis dicti Domini Regis ad placita coram ipſo Rege tenend. aſſign. * P. 443.

Nos quorum nomina ſubſcript. ſunt cuſtod. pacis Domini Regis in Com. Berks Juſtic. dicti Domini Regis ad pacem ejuſdem Domini Regis infra Com. Berks præd. conſervand. Necnon ad diverſ. felon. tranſgr. & al. malefacta in eodem Com. perpetrat. audiend. & terminand. aſſign. certificamus quod virtute cujuſdam Commiſſionis dicti Domini Regis ſub magno ſigillo ſuo Angliæ debito modo confect. geren. dat. apud Weſtm. 23 Novemb. jam ult. præterit. ac omnibus cuſtodibus pacis dicti Domini Regis infra Com. Berks. præd. direct. 8 Febr. jam ult. præterit. apud Reading in Com. præd. obtulimus, Anglice *tendered*, juramentum Primaciæ, Anglice *of Supremacy*, mentionat. & expreſſ. in quodam ſtatuto fact. 1 Eliz. nuper Reginæ Angliæ Henrico Englefield &c. ſeparatim & adtunc & ibidem ſcilicet eodem 8 die Febr. nunc ult. præterit. Ac requiſivimus eoſdem Henr. Englefield &c. ſeparatim præſtare ſacramentum præd. Et ulterius Certificamus quod ipſi iidem Henricus &c. adtunc & ibidem recuſaver. & quilibet eorum ſeparatim recuſavit præſtare ſacrament. præd. In cujus rei teſtimonium manus & ſigilla noſtra &c. 13 March 31 Car. 2. Annoq. Domini 1678.

They find the act of Parliament 1 Eliz. *intitled*, an act to reſtore to the crown the ancient juriſdiction over the eſtate eccleſiaſtical and ſpiritual, and aboliſhing all foreign powers repugnant to the ſame; and the clauſe therein, who are compellable to take the oath, and the oath itſelf; and that all and every perſon and perſons that at any time hereafter ſhall be preferred, promoted or collated to any archbiſhoprick or biſhoprick, or to any other ſpiritual or eccleſiaſtical benefice, promotion, dignity or office, or miniſtry, or that ſhall be by your highneſs, your heirs or ſucceſſors, preferred or promoted to any temporal or lay office, miniſtry or ſervice

service within this realm, or in any your highness dominions, before he or they shall take upon him or them to receive, use, exercise, supply or occupy any such archbishoprick or bishoprick, promotion, dignity, office, ministry or service, shall likewise make, take and receive the said corporal oath before mentioned upon the *Evangelists*, before such persons, as have or shall have authority to admit any such person to any such office, ministry or service, or else before such person or persons, as by your highness, your heirs or successors, by commission under the great seal of
* P. 444. *England*, shall be named, assigned or appointed to * minister the said oath; and that it may likewise be farther enacted by the authority aforesaid, that if any such person or persons, as at any time hereafter shall be promoted, preferred or collated to any such promotion spiritual or ecclesiastical benefice, office or ministry, or that by your highness, your heirs or successors shall be promoted or preferred to any temporal or lay office, ministry or service, shall and do peremptorily and obstinately refuse to take the same oath so to him to be offered, that then he or they so refusing shall only be judged disabled in the law to receive, take or have the same promotion spiritual or ecclesiastical, or the same temporal office, ministry or service within this realm, or any other your highness dominions, to all intents, constructions and purposes.

That by another act 5 Eliz. *intitled*, an act for assurance of the queen's royal power over all estates and subjects within her dominions, *the clause containing who shall take the said oath.*

And be it enacted by the authority aforesaid, that the lord chancellor or keeper of the great seal of *England* for the time being, shall and may at all times hereafter by virtue of this act, without any farther warrant, make and direct commission or commissions under the great seal of *England* to any person or persons, giving them or some of them thereby authority to tender and minister the oath aforesaid to such person or persons, as by the aforesaid commission or commissions the said commissioners shall be authorised to tender the same unto.

They find also the next clause expressing the penalty for the first refusal of the said oath, and the clause of certificate of refusal into the King's Bench, and concerning the indictment of the offender.

That the defendants 23 *November* 30 *Car.* 2. and 8 *Febr.* 31 *Car.* 2. were not any officers or ministers mentioned in the said statute of 1 or 5 *Eliz.*

That

That there was no other commiſſion made to the ſaid *Harriſon* and *Croome* to tender the ſaid oath to the ſaid defendants; and the jury conclude, *Et ſi* the defendants are guilty or not *petunt adviſamentum Curiæ.*

And the points intended in this ſpecial verdict were three, *viz.* 1. The words of the act of 5 *Eliz. cap.* 1. being, *that the lord Chancellor,* &c. *ſhall,* &c. *make,* &c. *commiſſion,* &c. to any perſon or perſons, giving them or ſome of them thereby authority to tender and miniſter the oath aforeſaid to ſuch perſon or perſons, as by the aforeſaid commiſſion or commiſſions the ſaid commiſſioners ſhall be authorized to tender the ſame oath unto, whether the commiſſion ſpecified in * P. 445. the record be purſuant to the ſaid act, for it is not directed to any perſons particularly, nor to tender the ſaid oath to any perſons by name; and if it ſhall be in the commiſſioners diſcretion to tender it as they ſhall think fit, they ſhall take upon them to judge who are *Romanæ ſuperſtitionis ſectatores,* or ſo reputed; and though ſeveral commiſſions were made out about the ſame time of the ſame term with this, yet the lord Chancellor did cauſe new commiſſions to be made out, expreſſing the names of the perſons to whom the oath ſhould be tendered; and this objection was raiſed by the lord chief juſtice *Scrogs* before whom the verdict was found; but it was reſolved by the other three judges (myſelf doubting) that this commiſſion was very good, becauſe the power is left to the commiſſioners to chooſe whom they will tender the oath unto by the clauſe of the act; and in this manner were the ancient commiſſions ſhortly after the ſtatute made.

The exception was, *that the indictment ſets forth a certificate from the commiſſioners under their hands, but not under their ſeals,* as the ſtatute requires; but to this the court anſwered, that in regard the certificate is found *in hæc verba* in the verdict to be under their ſeals, it ſhall be amended, and ſo good enough; and it was amended accordingly.

The third exception was, *the certificate is directed only to the judges by name, and not to the king in his court of King's Bench,* as the act requires; but reſolved by the ſaid three juſtices, that that is good enough, becauſe it ſhall be intended that the ſaid judges made the court, and were therein ſitting at the time of the certificate: but I alſo doubted of this anſwer; but the judgment was given againſt the defendants. And as to the finding that the defendants were none of the officers or miniſters mentioned in the ſeveral ſtatutes of 1 and 5 *Eliz.* the whole court were of opinion, it was not material, becauſe by the clauſe of 5 *Eliz.* impowering

ing the lord chancellor to make out commiſſions, all perſons, though not officers, may be offered the ſaid oath if the commiſſioners think fit.

* P. 446.

* Taverner's *Caſe.*

Mandamus.

JEREMIAH TAVERNER, having been choſen into the livery of the company of *vintners* in *London*, had a *Mandamus* directed to the maſter, wardens and aſſiſtants of the ſaid company to admit him to be a livery-man according to his ſaid election, to which they return,

That *London* is an ancient city, and that the citizens and freemen thereof time out of mind were, and ſtill are incorporated, as well by the name of mayor and commonalty of the city of *London*, as by the name of mayor, commonalty and citizens of the city of *London*, and that of the ſaid citizens there were ſeveral ſocieties, guilds and fraternities, of which the company of vintners is and always hath been one.

That in the ſaid ſociety there have been time out of mind certain men being citizens and freemen of the ſaid city and company, called livery-men, who were uſed to be choſen for the ſaid company.

That the ſaid company of vintners (as other companies) for the preſervation and maintenance as well of the honour, as ſtate and government of the ſaid city, as well at times of publick meeting and attendances of the mayor and aldermen, and other publick occaſions, and for the preſervation of the honour and reputation, and government of the ſaid company, and for the relief of the poor members thereof, have been forced to expend great ſums of money.

That the ſaid company of vintners have been anciently incorporated, and called by divers names; and that the 2 *Feb.* 9 *Jac.* the king by his letters patent incorporated them by the name of maſter, wardens, and freemen and commonalty of the myſtery of vintners of the ſaid city of *London*, and that they may make by-laws.

That time out of mind the place and office of the livery hath been a place and degree of pre-eminence in the ſaid company; and that as well before and ſince the ſaid letters patent every fellow of the ſaid company, who was elected into the place and office of one of the livery was uſed, and ought to be *Idoneus homo, ac de bono ſtatu & ſubſtantia qui bene potuit & ad vel ante admiſſionem ſuam per totum tempus præd. uſus fuit & conſuevit & debuit ſolvere pro & erga meliorem*

liorem & neceſſariam ſupportationem & ſuſtentationem ſocietatis præd. & neceſſaria onera & expenſa inde certam competen. denariorum ſummam.

* That without the aſſiſtance and relief which the ſaid company by ſuch payments hath had and received, it could not maintain its government and reputation. * P. 447.

That for many years before the 24 *April* 1656, the ſum of money which every livery-man upon his admiſſion paid, exceeded 31*l.* 13*s.* 4*d.* and then a by-law was made, that the payment ſhould be ſo much only; and from that time the ſaid ſum hath been always paid by every one admitted into the livery.

That 18 *June* 1680, *ante adventum brevis præd.* he was choſe to be a livery-man, and was then required to take the ſaid office upon him, and that the maſter, wardens and company were ready to admit him to the place of a livery-man upon payment of the ſaid ſum of 31*l.* 13*s.* 4*d.* which he ought to pay according to the by-law afore-mentioned; but he hath refuſed ſo to do, and thereupon the company refuſe to admit him until he ſhall pay the ſame.

Upon this return the counſel for *Taverner* argued, that the by-law therein mentioned for impoſing 31*l.* 13*s.* 4*d.* upon every livery-man was unreaſonable and againſt law, and a grievance to the ſubject: but the court reſolved, Were the ſum more or leſs, it could not make the by-law void, for it is to bind only the members of the corporation; and when a man will agree to be of a company, he doth thereby ſubmit himſelf to the laws thereof, and we are not to take notice of the extravagancy of charges they lay upon themſelves. And 'tis convenient that the company have ſuch power to keep up their reputation, and the honour of the city of *London*; and ſo allowed the return to be good.

Term.

The Caſe of the Town of Winchelſea.

Certiorari. 2 Lev. 86. Trem. 556. 3 Keb. 154, 314.

A CERTIORARI was granted to the mayor, jurats and commonalty of the ancient town of *Winchelſea* in *Suſſex*, to remove an order or decree made by them; who made this return: *viz.*

That there have been time out of mind in *Kent* and *Suſſex* five ancient towns, *viz. Haſtings*, *Sandwich*, *Dover*, *New-Rumney* and *Hith*, which have been always called the Cinque Ports of the kingdom; and that in *Suſſex* there are, and always have been two other ancient towns called *Rye* and *Winchelſea*, which are members of the ſaid Cinque Ports.

That the ſaid town of *Winchelſea* hath been time out of mind incorporated by the name of mayor, jurats and commonalty of *Winchelſea*.

That all the ſaid Cinque Ports with their members have been time out of mind places for ordering proviſion, and preſervation of ſhipping of the kings and queens of this kingdom of *England* for the time being; and that by reaſon of their ſituation upon or near the ſea-ſhores, the inhabitants and reſidents thereof, as well for ſafe keeping the ſaid towns, as of the ſaid kingdoms of *England* againſt foreign invaſion of enemies, have always and ought to keep beacons, watch-houſes and guards night and day, as well by ſea as land; and for better maintenance thereof, the ſaid town of *Winchelſea* in their common hall uſed to make taxes and rates upon every inhabitant or occupier of houſe or land, lying or being within the ſaid town or liberties thereof, which ſaid privileges were confirmed by *Magna Charta*.

That 1 *May* 32 *Car.* 2. they made a tax of 6*d. per* pound for the maintaining of the ſaid beacons and warehouſes according to a ſchedule annexed to the ſaid tax, and that there was no other order or decree. And ſet out the ſchedule.

And to this ſchedule was objected, That 'tis not ſet forth that

that the beacons or watch-houſes were in decay or out of repair, and ſo the rate unneceſſary.

* But reſolved, It is well enough; for 1ſt, 'Twould be dangerous to expect till they became in decay, for then there muſt be no beacon till repaired, nor no watch-houſes in the mean time, which would be dangerous for the place. 2. 'Tis to be preſumed that the inhabitants will not tax themſelves unneceſſarily, and they do all concur in the taxation: And ſo the order was confirmed. * P. 449.

Richard Sheldon *verſus* Michael Clipſham.
Aſſumpſit.

THE plaintiff declares in an *Indebitat' Aſſumpſit* for 100*l.* received to the plaintiff's uſe; and alſo upon an *Inſimul Computaſſet* for another 100*l.* the ſame day. The defendant pleads, that the ſaid ſeveral ſums of 100*l.* in the declaration reſpectively ſpecified, are for one and the ſame cauſe of action for one ſum of 100*l.* only, and not for ſeveral ſums of 100*l.* and that after the time of the ſaid ſeveral promiſes reſpectively ſpecified, *viz.* ſuch a day, the defendant paid to one *Bellamy* by the plaintiff's order 30*l.* in part of payment and ſatisfaction of the monies in the declaration ſpecified; and that the defendant in full payment and ſatisfaction of the ſaid monies demanded by the plaintiff in his declaration did then become bound to the plaintiff in a bond of 120*l.* conditioned for payment of 65*l.* to the plaintiff at a certain day in the ſaid condition ſpecified as yet not incurred; which 30*l.* and bond the plaintiff accepted; *Et hoc parat'*, &c. Pleading. 2 Jon. 158.

Upon this plea the plaintiff demurred, and the whole court were of opinion that the plea is good; for though 'tis frequent to lay a declaration for a debt ſeveral ways in an *Aſſumpſit*, and 'tis not a good plea to ſay that the ſeveral ſums are but only for the ſum firſt mentioned, and ſo go no farther; yet when the defendant pleads over, that the very ſum demanded is ſatisfied, 'tis a good plea; and if that the two ſeveral hundred pounds were two diſtinct ſums, the plaintiff might have replied ſo, and taken iſſue thereupon. But he admits that there was but 100*l.* due, and that ſatisfied, the plea is good. But at the importunity of the plaintiff's counſel we gave him leave to waive the demurrer, and take iſſue upon the ſatisfaction, upon paying to the defendant his coſts.

Elizabeth

* P. 450. * Elizabeth Caſe *verſus* James Barber.

Accord. 1 Danv. Abr. 77. P. 4. 241. p. 19. 2 Jon. 158.

THE plaintiff declares in an *Indebitatus Aſſumpſit* for 20*l.* for meat, drink, waſhing and lodging for the defendant's wife, provided for her at the requeſt of the defendant, and lays it two other ways. The defendant pleads that after the making the ſaid promiſe, *&c.* and before the exhibiting the ſaid bill, *viz.* ſuch a day, it was agreed between the plaintiff and the defendant and one *Jacob Barber*, his ſon, that the plaintiff ſhould deliver to the defendant divers clothes of the defendant's wife then in her cuſtody, and that the plaintiff ſhould accept the ſaid *Jacob*, the ſon, for her debtor for 9*l.* to be paid as ſoon as the ſaid *Jacob* ſhould receive his pay due from his majeſty, as lieutenant of the ſhip called the *Happy Return*, in full ſatisfaction and diſcharge of the premiſſes in the declaration mentioned; and avers that the plaintiff the ſame time did deliver to the defendant the ſaid clothes, and that ſhe accepted the ſaid *Jacob* the ſon, her debtor for the ſaid 9*l.* and that the ſaid ſon agreed to pay the ſame to the plaintiff accordingly; and that the ſaid *Jacob* afterwards, and as ſoon as he received his pay as aforeſaid, *viz.* 27 *April* 32 *Car.* 2. was ready and offered to pay the ſaid 9*l.* and the plaintiff refuſed to receive it; and that the ſaid *Jacob* hath always ſince been, and ſtill is ready to pay the ſame, if the ſaid plaintiff will receive it. *Et hoc paratus, &c.* The plaintiff demurs. And it was alledged by the defendant's counſel that the plea is good; for though in *Peyto*'s caſe, and formerly it hath been held, that an accord cannot be pleaded unleſs it appears to be executed, 9 *Co.* 79. *b.* 3 *Cro.* 46. *pl.* 2. yet of late it hath been held that upon mutual promiſes an action lies, and conſequently there being equal remedy on both ſides an accord may be pleaded without execution as well as an arbitrement, and by the ſame reaſon that an arbitrement is a good plea without performance; to which the court agreed; for the reaſon of the law being changed, the law is thereby changed; and anciently remedy was not given for mutual promiſes, which now is given; and for this reaſon, *Mich.* 18 *Car. B. R. Palmer* verſus *Lawſon*, *ante*. In *indebitatus Aſſumpſit* againſt an executor upon a contract made by the teſtator; the defendant pleads judgment in debt upon ſimple contract againſt him for the debt of the teſtator, and after argu-
* P. 451. ment * reſoved a good plea; becauſe though in debt againſt an executor upon a ſimple contract the defendant may demur,

mur, yet when he admits the demand, and executors are now liable to pay ſuch debts in action upon the caſe, the judgment ſo obtained was pleadable; ſo *Vaughan Rep. Dee* verſus *Edgcomb.*

But in this caſe at bar judgment was given for the plaintiff for two reaſons.

1. Becauſe it doth not appear that there is any conſideration that the ſon ſhould pay the 9*l.* but only an agreement without any conſideration.

2. Admit the agreement would bind, yet now by the ſtatute of frauds and perjuries, 29 *Car.* 2. this agreement ought to be in writing, or elſe the plaintiff could have no remedy thereon; and though upon ſuch an agreement the plaintiff need not ſet forth the agreement to be in writing, yet when the defendant pleads ſuch an agreement in bar, he muſt plead it ſo as it may appear to the court, that an action will lie upon it, for he ſhall not take away the plaintiff's preſent action, and not give him another upon the agreement pleaded.

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* Term. Mich. 33 Car. 2. B. R. * P. 452

Charles Holmes *verſus* Elizabeth Meynel.
Ejectment. Derby.

Eſtate. 3 Danv. Ab. 238. p. 2. 2 Jon. 172. 2 Show. 136. Pollexf. 425. Skin. 17.

OF the demiſe of *Francis Meynel* of the moiety of the manors of *Meynel-Langley* and *Kirk-Langley* 300 meſſuages, 500 acres of land, 200 acres of meadow, and 500 acres of paſture in *Meynel-Langly* and *Kirk-Langly*. Upon Not guilty pleaded, the jury find a ſpecial verdict, *viz.*

That one *Iſaac Meynel* was ſeiſed in fee entirely as well of the manor of *Meynel* and *Kirk-Langly*, as of all the tenements in the declaration, 2 *Novemb.* 1675. made his will in writing thus: I give and deviſe all my lands in *Meynel* and *Kirk-Langly* in the county of *Derby* unto my two daughters *Elizabeth* and *Anne Meynel*, and their heirs, equally to

be divided betwixt them: and in caſe they happen to die without iſſue, then I give and deviſe all the ſaid lands to my nephew *Francis Meynel*, eldeſt ſon of my brother *William Meynel* deceaſed, and to the heirs male of his body; and for want of ſuch iſſue, to *William Meynel*, brother of the ſaid *Francis*, and the heirs male of his body, the remainder to *Godfrey Meynel*, brother of the ſaid *Francis* and *William* in tail male, the remainder to *John* brother of the ſaid *Francis*, *William* and *Godfrey* in tail male; and for want of ſuch iſſue I give and deviſe the ſaid lands to the next heir male of the name and family of the *Meynels*, and died without iſſue male, having iſſue *Elizabeth*, now defendant, and *Anne*, his two only daughters, who entered and became ſeiſed *prout Lex, &c.* *Anne* died without iſſue, *Francis* the leſſor of the plaintiff entered.

And if for the plaintiff, for the plaintiff, &c.

After ſeveral arguments at the bar, the court by the mouth of the chief juſtice gave judgment for the defendant. I had prepared my argument, as the reſt of the judges had done; but in regard we were all unanimous, it was thought needleſs for us all to argue. My argument follows.

In this caſe two points have been raiſed.

* P. 453. * 1. What eſtate *Elizabeth* and *Anne* have by this will.

2. Whether upon the death of *Anne* without iſſue *Francis* in remainder takes any thing?

As to the 1ſt, I conclude that *Elizabeth* and *Anne* have ſeveral eſtates-tail by moieties; for though the deviſe be to them and their heirs in the beginning, yet when the will afterwards ſays, *And if they die without iſſue*, it ſhews that *(heirs)* was intended heirs of their bodies: ſo it hath been conſtrued in grants.

5 *H.* 5. 6. *a.* Lands granted to man and his wife, *& aliis hæredibus* of the huſband, if the heirs of the huſband and wife ſhall die *ſine hæredibus de ſe*, the huſband and wife had an intail: *A fortiori* in a will, 2 *Cro.* 448. *King* verſus *Rumbal*, where many books are cited; and *Bridgman* 1. *Pell* verſus *Brown*; ſo that as to this point, 'tis not much denied on either ſide.

As to the 2d point. I conceive *Francis* takes nothing upon the death of *Anne*, but that her part remains to her ſiſter by way of a croſs remainder.

1. I take notice that the main deſign and intent of the teſtator was, that in the firſt place he would take care of his own children, and then look after the continuation of his own name and family; for firſt he gives to his daughters, and afterwards the remainders to his nephews, then to the

next

next heir male of the name and family of the *Meynels*, following herein the law of nature, and the ordinary courſe of the world.

That this was the intent appears by the words of the will: 1. *In caſe (they) die without iſſue, i. e.* both of them, 'tis not *they or either of them.* 2. *All the ſaid lands*, which intends both parts, and not a moiety; and *All* cannot paſs till both are dead without iſſue. And if the teſtator had been aſked, what he meant by the lands going to his nephew after the death of his daughters without iſſue, he would have anſwered, that he ſhould have the lands when both of his daughters ſhould be dead without iſſue, and not before.

2. This intent conſiſts with the rules of law, for 'tis a general rule, *That a will ſhall never be conſtrued by implication to diſinherit the heir at law, unleſs ſuch implication be neceſſary, and not only conſtructive and poſſible*, 13 *H.* 7. 17. *Br. Deviſe* 52. A man deviſed his goods to his wife and after the deceaſe of his wife, his ſon and heir ſhall have the houſe wherein his goods are; the ſon ſhall not have the houſe during the wife's life; for though it be not * expreſsly * P. 454. deviſed to the wife, yet by his intent it appears, that the ſon ſhall not have it during her life, and therefore it is a good deviſe to the wife by implication, and the deviſor's intent: but if it were a deviſe to a ſtranger after the death of the wife, the heir ſhall have it during the wife's life, becauſe it is not a deviſe to the wife by a neceſſary implication.

Hill. 20 & 21 *Car.* 2. *C. B. Gardiner* verſus *Sheldon*, *Vaughan* 295. *William Roſe* made his will thus, *My will and meaning is, that if it happen that my ſon* George, Mary *and* Katharine *my daughters, do die without iſſue of their bodies, then all my freeholds ſhall come, remain and be to my nephew* William Roſe *and his heirs for ever.* Reſolved the ſon and daughters had no eſtate by the will, and ſo are the books of *Moor* 7. *pl.* 24. and 123. *pl.* 269. 2 *Cro.* 74 & 75. *Horton* verſus *Horton*.

In our caſe here is no neceſſary implication that *Francis* muſt take immediately after the death of *Anne* without iſſue, for *Elizabeth* is ſtill alive, and he is not to have the land till the deviſor's daughters ſhall die without iſſue.

2. Had the teſtator ſet forth at length the croſs remainders, this queſtion had been out of doubt. Now he being *inops Conſilii* we ought by conſtruction to make his words anſwer his intent, appearing in other parts of the will, as near as may be.

As for authorities we muſt not expect many in caſe of a

will, for the old books cannot have any unleſs of a deviſe by cuſtom, which is rare; and every caſe upon a will ſtands upon its own legs, according to the penning thereof; yet *Mich.* 32 *Eliz. C. B.* 4 *Leon.* 14. *pl.* 51. is direct in the point. The caſe was, *A.* ſeiſed of lands had iſſue two ſons, and deviſed part to his eldeſt in tail, and the other part to his younger in tail, with this clauſe in the will, *That if any of his ſons died without iſſue, that then the whole land ſhould remain to a ſtranger in fee,* and died; the ſons entered into the lands deviſed to them reſpectively, and the younger died without iſſue, and he to whom the fee was deviſed entered; and adjudged that his entry was not lawful, and that the eldeſt ſon ſhould have the land by the implicative deviſe.

As to the caſes objected, which are, 2 *Cro.* 655. *Guilbert* verſus *Witty*. A deviſe of three ſeveral meſſuages to three ſeveral children, *Provided if all my ſaid children ſhall die without iſſue of their bodies, then all the ſaid meſſuages ſhall* * P. 455. * *remain to my wife and her heirs,* and two died. Reſolved the wife ſhall have the two parts.

Reſp. That differs much from this caſe, becauſe there are three deviſes, in which caſe croſs remainders will be more difficultly ſettled; for whether the ſurvivors ſhall be jointenants for life with ſeveral inheritances, or tenants in common in tail, would be perhaps ſome queſtion, as appears by the report of the ſame caſe, 2 *Roll. Rep.* 281. But in our caſe no ſuch difficulty can ariſe.

Object. Paſch. 12 *Jac. C. B. Johnſon* verſus *Smart*, 2 *Roll. Abr.* 416. *F. pl.* 3. A deviſe to two for their lives, remainder to their two ſons, equally to be divided and to their heirs, and each of them to be the other's heir; and if they both ſhall die without iſſue, the remainder to another; one dies, his ſhare ſhall go to the remainder man.

Reſp. This caſe cannot be law, becauſe 'tis apparent that each of them was to be the other's heir, which is as plain a croſs remainder as can be. 2. This caſe was received by *Roll* from ſome other hand, and it is reported in a private report to be quite another caſe; for 'twas upon evidence in a trial at bar in a caſe of a ſurrender of a copyhold, and not a deviſe; and *Roll* could not be a reporter at that time, for 'twas before he came to ſtudy the law. And each to be the other's heir makes a croſs remainder. *Br. Deviſe* 38. *Done* 44. *Pet. Br.* 94. *b. pl.* 431.

Object. Dyer 326. *a. Huntley*'s caſe, which was, that he being ſeiſed of two houſes, one in St. *Michael Queenhith*, and the other in St. *Michael Fleſh-Shambles*, which laſt pariſh was laid to the pariſh of *Chriſt-Church* in *London*, and deviſes

deviſes that houſe in St. *Michael Fleſh-Shambles* to his wife for life, the remainder to a woman and her brother, and the heirs of their bodies, and for default of ſuch iſſue, to the right heirs of the deviſor; the brother dies without iſſue; the ſiſter hath iſſue, and dies; and whether the intire houſe ſhall go to the iſſue, or only the moiety, and the other moiety to the heir of the deviſor, was the queſtion.

Reſp. Though this queſtion is put in the book, yet I find no argument of it; and that caſe will differ from this, in regard there the particular eſtates were not limited to the children, but to ſtrangers, and ſo intrenches not upon the rule in 13 *H.* 7. whereby an heir is diſinherited. And *Dyer* ſeems to intimate, that the pleading of the caſe was more inſiſted upon than this point; for he puts the ſtreſs of the caſe to lie upon the pleading, that the houſe lay in the * pariſh of *Chriſt-Church*, whereas the will ſays, in St. *Mickael Fleſh Shambles*, without averment of the union of thoſe pariſhes. And 1 *And.* 21. ſays, the ſtreſs of the caſe was upon the apportionment of rent. * P. 45.

As to juſtice *Windham*'s caſe, 'tis not to our purpoſe, becauſe that is the caſe of a deed, which muſt be taken ſtrongeſt againſt the grantor: here it is the caſe of a will, the conſtruction whereof is to be made according to the intent of the deviſor.

And ſo upon the whole matter, in regard the words make againſt the plaintiff, and the intent makes for the defendant, I conceive judgment ought to be given for the defendant.

Morgan *verſus* Vaughan. *Error in Dower at* Brecnock.

Eſtoppel. 3 Danv. Abr. 259. p. 2. 2 Jon. 170. 2 Show. 168. Skin. 15.

THE caſe was, 29 *Car.* 2. *Vaughan* brought a writ of dower *unde nihil habet* in the great ſeſſions at *Brecnock* againſt *Morgan*, and had judgment. And *Morgan* the tenant brings a writ of error, and aſſigns for error, that he was an infant at the time of the judgment given, *viz.* of the age of fourteen and no more, and that he appeared by attorney, whereas he ought to have appeared by guardian. And upon this infancy iſſue was taken, and laid to be at *Abergavenny in Com. Monmouth*, and tried at *Monmouth*, and found for the plaintiff in the writ of error.

And now *Pollexfen* moved in arreſt of judgment two exceptions.

1. The writ of error was brought 26 *Car.* 2. and the tenant had alledged in 20 *Car.* 2. that he was *infra ætatem*, *viz.*

viz. fourteen and no more; and this writ of error is brought 26 *Car.* 2. and error aſſigned by attorney, and then of his own ſhewing he was alſo under age when he brought the writ of error, and aſſigned the error, and he is now eſtopped to ſay the contrary.

2. This infancy ought to have been tried where the land lies, which is in *Brecnockſhire*, and the viſne is from *Abergavenny in Monmouthſhire*, and there is no ſuggeſtion that 'tis the next county to *Brecnockſhire*.

But notwithſtanding theſe objections judgment was reverſed by the whole court.

* P. 457. * *As to the firſt*, Here is no eſtoppel, becauſe the alledging the preciſe age in the *viz.* is idle and not traverſable, and he might have alledged any other age, and the defendant in the writ of error could not have taken iſſue upon it.

Paſch. 12 *Eliz. Dyer* 289. *b. pl.* 59. The lord diſtrains for rent the cattle of the tenant, leſſee for ſixty years, who pleads that the tenant made him a leaſe for ten years, and prays in aid, and granted. Afterwards the bargainee of the tenant after the ten years were expired, enters, the leſſee pleads his leaſe of ſixty years: Reſolved he was not eſtopped by pleading his leaſe to be but ten years in his *Aid prier*, becauſe the leaſe, not the number of years, was material.

Mich. 7 *E.* 4. 18. *Fitzh. Eſtoppel* 69. *Reſcous.* The plaintiff declares that *B.* held of him an houſe and an acre of land by ten marks, and that the plaintiff diſtrained, and the defendant made *Reſcous*. The defendant pleads that the plaintiff at another time brought an aſſize againſt the ſaid *B.* of the ſaid ten marks, who pleaded *Hors de ſon Fee*, and the plaintiff made title that the defendant held the houſe, and five acres of land and a mill by the ſervices of ten marks, and ſo within his fee, and that the plaintiff was nonſuit, and after *B.* leaſed to the defendant for years, and demands judgment if the plaintiff ſhall be received to ſay, that the ten marks are iſſuing out of the houſe and acre only; and reſolved that the plea is not good, becauſe the quantity of the ſervices is not material in an action of Reſcous, but the tenure only.

Fitz. Eſtoppel 247. Aſſiſe by *Jane* late wife of *Richard Griffith*; the defendant pleads feoffment by deed of the plaintiff's father with warranty; the plaintiff replies *Riens paſſa per le fait*; the defendant rejoins, that the defendant before that time had brought an aſſiſe againſt the plaintiff and her late huſband, who to it pleaded that the lands were given to one *W.* and *M.* his wife, and the heirs of their bodies,

bodies, the remainder to *Jane*, the now plaintiff and her heirs, that *M.* died without iſſue by *W.* and that *W.* after the death of *M.* aliened in fee to the now defendant, for which *Jane* entered and demanded judgment *Si, &c.* the plaintiff there, and now the defendant replied, that the feoffment was during the life of *M.* by the deed, and the jury found accordingly; judgment if the plaintiff ſhall now be admitted to plead, that nothing paſſed by that deed: and reſolved the plaintiff here was not eſtopped, becauſe in the firſt action the deed was not in queſtion, but the time of the feoffment, *viz.* whether before or after the death of *M.*

* *Fitz. Brief* 180. *H.* One ſhall not be eſtopped but of that which he may have a traverſe. * P. 458.

As to ſecond point, Nonage was well tried where the party was commorant, and not where the writ was brought, becauſe collateral to the action. 1 *Bulſtr.* 129. 1 *Brownl.* 150. *Ord* verſus *Moreton*. *Fitz. Viſne* 63.

Sir George Fletcher's *Caſe*.

IN replevin. The defendant avows upon the ſtatute of 13 *Car.* 2. *cap.* 10. for killing of deer, and that the plaintiff was aiding to the killing of deer in the avowant's park; the plaintiff pleads in bar, that ſhe was not aiding, and iſſue thereupon, and verdict for the plaintiff. Deer-ſtealing. Trem. 318.

And it was moved for the avowant, that the iſſue is a jeofail, becauſe it is an immaterial iſſue; for the aiding was found before a juſtice of peace, and ſhall not be tried over again. I was not at the reſolution of the court but it ſeems plain that the ſtatute of 32 *H.* 8. *cap.* 30. helps misjoining of iſſues. 3 *Cro.* 778. *Dighton* verſus *Bartholomew, Goldſb.* 39. *pl.* 15.

Paſch. 1657. *B. B. Spathurſt* verſus *Overind*, error in *C. B.* debt upon a bond againſt *Gr. Spat.* as executor of *J. Spat.* The defendant pleads it is not his deed; the jury find it is the deed of *Spat*, as the plaintiff declared. And in error judgment affirmed, becauſe here was an affirmative and a negative, and by the jury's finding the plaintiff had cauſe of action.

If the bar be good, and the replication naught, and iſſue be taken upon it, they ſhall replead to the replication, and the bar remains; and ſo if the bar is good, and the replication good, and the rejoinder naught, and iſſue taken upon it, they ſhall replead to the rejoinder, and the bar and replication remain: but if the bar is naught, and the replication

replication good, and iſſue taken upon it, they ſhall replead for the whole anew, becauſe the bar was naught. *Long* 5 *E.* 4. 109. *a.*

* P. 459. * Jane Kingdon Adminiſtratrix of Richard Kingdon Eſquire, *Plaintiff*; Richard Jones Lord Viſcount Ranelagh, *Sir* James Hays & al', *Defendants.* *Error in* C. B. *Covenant.*

Error. Skin. 6. 26. 2 Jan. 150.

THE plaintiff brought an action of covenant, and judgment was given againſt her in *C. B.* upon demurrer; and now ſhe brought a writ of error in *B. R.* and the caſe upon the record in ſhort is,

The plaintiff declares upon articles indented of nine parts, dated 5 *Aug.* 23 *Car.* 2 made between the ſaid lord viſcount *Ranelagh* of the firſt part, Sir *Alexander Bence* of the ſecond part, Sir *James Hayes* of the third part, *John Bence* of the fourth part, *Joſeph Dean* of the ſixth part, *Robert Huntington* of the ſeventh part, *John Stepney* of the eighth part, and the ſaid *Richard Kingdon* of the ninth part, wherein after a recital of an indenture under the great ſeal of *England* dated 4 *Aug.* 23 *Car.* 2. whereby the king granted a leaſe of the great branches of his revenue in *Ireland* to the ſaid lord viſcount *Ranelagh*, Sir *Alexander Bence* and the reſt, for five years, to end 25 *Decemb.* 1675. The parties did all agree amongſt themſelves ſeverally, that the ſaid profits of what ſhould accrue after all the payments to be made purſuant to the king's grant, ſhould be divided into twelve parts, *viz.* four parts to the lord viſcount *Ranelagh*, and the other eight to each of the others. And that no money ſhould be paid out of the office (which was to be kept for iſſuing out of caſh) but according to the indenture made by his majeſty; and 150 *l.* quarterly to each ſhare; and that the 150 *l.* ſhould not be taken out of the caſh, but ſhould be continued there, and a note given by the receiver general of the ſaid parties declaring the ſame to be advanced for the carrying on of the undertaking, at intereſt of 10 *l. per cent.* until all the ſaid articles ſhould be performed, and that the ſaid intereſt ſhould be paid quarterly. And if there ſhould not be ſufficient caſh to anſwer the ends of the agreement, then the quarterly payment ſhould be made uſe of to that purpoſe

Et convent' ſuit & agreat' inter omnes & ſingulas dictas perſonas Articulis prædictis, & quibuſlibet eorum per & pro ſeipſo ſeparatim & reſpective & non conjunctim vel

unus

unus eorum pro altero eorum & pro ſeparalibus & reſpectivis Hæredibus * Executoribus & Adminiſtratoribus ſuis convenit promiſit conceſſit & agreavit ad & cun: quolibet altero eorum ſeparatim & reſpective & non corjunctim & ad & cum Executoribus & Adminiſtratorbus ſuis quod quilibet prædict. partium Articulis prædictis reſpective Hæredes Executores & Adminiſtratores ſui & quilibet eorum ſecundum illorum & cujuſlibet illorum dict' proportionabiles partes vel ſortes de tempore in tempus & ad omnia tempora extunc impoſterum bene & ſufficienter ſalvarent ſervarent indemp' & indemnificat. quemlibet & unumquenque al' & ejus & eorum Hæred. Execut. Adminiſtrator. & Aſſign. contra Regiam Majeſtatem Hæredes & Succeſſores ſuos & omnes perſonas quaſcunque de & ab omnibus & quibuſlibet Conventionibus in prærecitat. Indentura content. ex partibus dictarum partium Articulis prædict' agend. & performand. & de & ab omnibus actionibus ſectis & moleſtiis quæ in lege vel æquitate vel aliter venirent creſcerent vel acciderent vel ſurgerent pro vel ratione cujuſlibet materiæ vel rei quæ agerentur vel fierent in vel per rationem vel ſuper computum dictæ ſuſceptionis in prædict' recitat' Indentura mentionat. & de & ab omnibus cuſtag. miſis & demand. quibuſcunque tangen. vel concernen. eadem. * P. 460.

Et ſi accideret quod aliquis vel plur. dictarum partium Articulis prædict' ſhould happen to die before 25 *Decemb.* 1675. that then the ſhare and intereſt of the perſons ſo dying ſhould devolve and be veſted in the ſurvivors according to their reſpective ſhares: and that then likewiſe the ſaid ſurviving parties within two months after ſuch death ſhould well and truly pay to the executors and adminiſtrators of the party dying all and every ſuch ſum and ſums of money as had been advanced by the party deceaſed out of the ſaid quarterly payments of 150 *l.* *per annum*, together with the intereſt thereof which ſhould be then due and unpaid.

That the inteſtate *Richard Kingdon* died before 25 *Decemb.* 1675. *viz.* 1 *Decemb.* 1675. and that the ſum of 2850 *l.* before the ſaid 1 *Decemb.* 1675. was advanced by the inteſtate out of the ſaid quarterly payment of 150 *l.* and that 712 *l.* at his death was due for the intereſt thereof, which the defendants have not paid, but do deny to pay to the plaintiff.

The defendants plead, that by the ſaid articles it was provided between the parties aforeſaid, that it ſhould not be lawful for the ſaid parties, or any of them, at any time or times during the continuation of the ſaid undertaking directly

ly or indirectly to give, grant, sell or assign his or their right, title or interest of, in or to the aforesaid indenture or any * P. 461. * covenant, clause or agreement in the same contained, to any person or persons whatsoever, *nisi cum licentia & consensu* of any four at the least or more of the rest of the parties to the said articles, as by one part of the said articles under the seal of the said *Richard Kingdon hic in Cur' prolat'* appears; and that the said *Richard Kingdon* in his life-time after the making the said articles, *viz.* 27 *Novemb.* 27 *Car.* 2. *apud, &c.* with the licence and consent of the said lord viscount *Ranelagh*, Sir *James Hayes*, *John Bence*, *Joseph Dean* and *Robert Huntingdon*, five of the said parties, by a writing under his seal dated the same day and year, did assign and transfer to *Lemuel Kingdon* and *William Dawson* all his right and interest which he had by virtue of the said grant of the king; by virtue whereof all the estate and interest of the said *Richard Kingdon* in the indenture and articles aforesaid were invested in the said *Lemuel Kingdon* and *William Dawson*, so as the part, proportion and interest of the said *Richard Kingdon* to the said indenture and articles *per jus accrescendi* did not come to the defendants. *Et hoc parati sunt verificare, unde &c.* To this plea the plaintiff demurred; and judgment was given in *C. B.* for the defendant.

Grace Cockman *versus* William Farrer.

Error.
3 Danv. Ab. 33. p. 6. 86. p. 8.
2 Jon. 181.
2 Show. 162.
Skin. 13.

A WRIT of error to reverse a fine levied in *C. B.* the writ of error was special, *viz.* that *Hugh Haworth* was seised of a messuage, 10 acres of land, and 9 acres of pasture *cum pertin' in Hallifax in Com. Ebor* in his demesne as of fee, and held them of Sir *Arthur Ingram* knight, as of his manor of *Hallifax* in free socage, *viz.* by fealty only; and so being seised 23 *Novemb.* 17 *Jac.* made his last will and testament in writing, and by the same did give the said tenements to *Michael Fawcett* for his life, the remainder to *Hugh Fawcet* and the heirs of his body, the remainder to the heirs of the body of the said *Michael Fawcet*, the remainder to *Michael Ward* and his heirs for ever. That the said *Hugh Haworth* died.

That the said *Michael Fawcet* entered and died, and that *Hugh* entered and became seised in tail, with the remainder over.

That the said *Hugh* levied a fine *Pasch.* 17 *Car.* 1. to *William Bradshow* and *Thompson*, in which there was error *Ad grave*

grave damnum Graciæ Cockman Viduæ, ſiſter and heir of * *Michael Ward* deceaſed, *eo quod* the ſaid *Michael Fawcet* and * P. 462.
Hugh Fawcet died both without iſſue.

The plaintiff aſſigns for error, that the ſaid *Hugh Fawcet* after the acknowledgment before commiſſioners, and before the return of the writ of covenant upon which the ſaid fine was levied, *viz.* 6 *April* 17 *Car.* 1. died. It was thus:

17 *Febr.* 16 *Car.* 1. Date of the writ of covenant.

18 *Febr.* 16 *Car.* 1. Date of the *Dedimus Poteſtatem.*

22 *Marcii* 16 *Car.* 1. The caption.

6 *April* 17 *Car.* 1. *Hugh Fawcet* died *ante ret' Brevis.*

Paſch. 17 *Car.* 1. The king's ſilver entered; ſo there was no queſtion but that it is error. Whereupon the plaintiff prayed a writ of *ſcire facias* to the conuſees, and to their heirs, and to the tertenants of the land, who returned *ſcire feci* upon *Thomas Thompſon* one of the ſaid cognizees, and one *William Bradſhaw*, couſin and heir of the ſaid *William Bradſhaw*, who was dead, and alſo *William Farrer*, eſq; the defendant and others tertenants.

The defendant *Farrer* pleads the very fine (now endeavoured to be reverſed) and five years in bar of the writ of error, to which the plaintiff demurred; and adjudged by the whole court for the plaintiff, and the fine was reverſed, and the reaſon was, *Non poteſt adduci exceptio ejuſdem rei cujus petitur diſſolutio.*

Co. Lit. 384. Tenant in tail makes a leaſe for life, or a gift in tail, rendering rent, and dies, the iſſue brings a *formedon* in diſcender, the reverſion and rent is no bar to the action. *Paſch.* 7 *H.* 4. 40. *a. pl.* 4. In a writ of error to reverſe an outlawry, the ſame outlawry is no good plea. And whereas it is ſaid, *Co.* 2 *Inſt.* 518. that a fine of lands in *C. B.* in ancient demeſne is a bar after five years, it is intended another fine, and not the ſame which was firſt levied; and the caſe is *in Terminis* 1 *Anderſ.* 172 & 74. and ſo the fine was reverſed.

Term.

Wedgewood and others *verſus* Baily and others.
Trover, Staff. *Error in* B. R.

Error.
3 Danv. Ab. 321. p 5.
Skin. 39.
2 Show. 177.
3 Mod. 249.

TROVER by five, and before verdict one of them dies, and they proceed to trial, and verdict for the plaintiffs, and then the plaintiffs ſuggeſt, that one of them is dead, and pray judgment for the reſt, and had it; and the defendants bring a writ of error, and aſſign for error, that the party died before verdict, and ſo a verdict was given for a dead perſon. And after argument at the bar judgment was reverſed, becauſe every man ſhall recover according to the right which he hath at the time of the bringing the action; and therefore if the heir brings an ejectment and his anceſtor dies ſubſequent to his action, he ſhall not recover. And in this caſe, although the plaintiffs were joint-tenants, and had a capacity of having the whole ſurvive, yet in truth every one had but a moiety, and ſo were not at the time of the action intitled to ſo much as they are after the death of one of the plaintiffs. And as to the caſe of 2 *Bulſt.* 262. *Spring's* caſe, he reports the reaſon of the judgment to be, becauſe by the death of one the action ſurvives to the other: but he miſtakes the reaſon, as appears by *Read* and *Readman's* caſe. As to the caſes where treſpaſs is brought againſt many, and one dies, they differ much from this caſe, becauſe there the treſpaſs is joint or ſeveral at the pleaſure of the plaintiff. As to the caſe of a replevin, 3 *Cro.* 574. though an avowant is to ſome purpoſes a plaintiff, yet he doth not bring the action, and ſo not within the rule, that the ſame right muſt continue which was at the bringing the action; and ſo judgment was agreed to be reverſed by the opinion of three againſt *Dolben*, who deſired time to conſider.

Griffith

* Griffith *verſus* Goodhand. *Covenant. Midd.* * P. 464.

THE defendant covenants that the plaintiff, his executors, adminiſtrators and aſſigns *valeant & poſſint habere* for ſeven years from 29 *Sept.* then next following the date which was 10 *Julii* 28 *Car.* 2. ſeven parts of all the grains made in the defendant's brew-houſe, and aſſigns one breach *(inter alia)* that the defendant with intention to deceive the plaintiff did put divers quantities of hops into the malt, of which the grains were made; by reaſon whereof the grains were ſpoiled, and became unprofitable to the plaintiff. Verdict for the plaintiff, and damages 100 *l.* Condition. 2 Danv. Ab. 44. p. 12. 2 Jon. 191. Skin. 39.

And it was moved in arreſt of judgment, that this breach is out of the articles, *viz. the putting the hops into the grains*, and damages being entire, the plaintiff ought not to have judgment. But judgment was given for the plaintiff, becauſe the intention of the parties is to be conſidered in all contracts; and it was the intent of the parties here, that the plaintiff ſhould have the grains for the uſe of his cattle, and they will not eat them when hops are put into them. So if I covenant that I will leave all the timber which is growing on the land I hire, upon the land at the end of the term, if I cut it down, though I leave it on the land, it is a breach of my covenant. So if I covenant to deliver ſo many yards of cloth, and I cut it in pieces and then deliver it, it is a breach of my covenant; for the law regards the real and faithful performance of all contracts, and doth diſcountenance all ſuch acts as are *in fraudem Legis*.

I grant to you an annuity till you have purchaſed 5 *s. per annum* rent, and you purchaſe 5 *s. per annum* jointly with another, that is no performance of the condition, becauſe my intent was that you ſhould purchaſe the rent for your own profit and advancement. *Dyer* 15. *a. pl.*

Watkinſon *verſus* Mergatron.

THE plaintiff ſued the defendant in the eccleſiaſtical court at *York*, for marrying his ſiſter's daughter, and the defendant prayed a prohibition, becauſe out of the levitical degrees; but denied by the whole court, becauſe it is a cauſe of eccleſiaſtical cognizance, and divines better * know how to expound the law of marriages than the common * P. 465. Prohibition. Skin. 37. 2 Jon. 191.

common lawyers; and though ſometimes prohibitions have been granted in cauſes matrimonial, yet if it were now *Res integra*, they would not be granted.

Okeden *verſus* Keynel. *Ante* 391.

Recuſancy. 2 Jon. 187. 2 Show. 179.

DEBT upon 23 *Eliz. cap.* 1. for not coming to church. At the trial, after the jury ſworn, and before verdict given, the defendant came into the court, and did there ſubmit, recognize, confeſs and acknowledge, that he had offended and done ill in not going to church, and not conforming himſelf to the law therein, and did then prove that he had conformed himſelf ſince the ſuit brought, by going to church, receiving the ſacrament, and behaving himſelf orderly and ſoberly during all the time of divine ſervice, according to the law; and did then and there promiſe and engage to conform, and go to church, and there to behave himſelf ſoberly and orderly, according to the law; and that the ſaid defendant was never indicted or proſecuted for any offence of this nature before.

This is an action for 20*l.* a month for not coming to church, tried at the aſſizes in *Dorſet*, and a verdict for the plaintiff for 40*l.* At the trial the defendant comes into court and conforms, and makes the above written recognition, Whether that doth diſcharge the action and verdict, or no, is the queſtion?

And the whole court did reſolve that the action and verdict were diſcharged; we did not argue the caſe publickly, but briefly gave our opinions. I had prepared my argument, but ſince we all agreed in opinion we did not argue.

The clauſes in the ſeveral acts of parliament to be taken notice of are theſe, 23 *Eliz. cap.* 1. Provided always, That every perſon guilty of any offence againſt the ſtatute (other than treaſon and miſpriſion of treaſon) which ſhall before he be thereof indicted, or at his arraignment or trial before judgment ſubmit and conform himſelf before the biſhop of the dioceſe, where he ſhall be reſident, or before the juſtices where he ſhall be indicted, arraigned or tried (having not before made like ſubmiſſion at any his trial, being indicted for his firſt like offence) ſhall upon his recognition of ſuch ſubmiſſion in open aſſiſes or ſeſſions of the county, where ſuch perſon ſhall be reſident, be diſcharged of all and
* P. 466. every * the ſaid offences againſt this act (except treaſon and miſpriſion of treaſon) and of all pains and forfeitures for the ſame.

1 Jac. cap. 4. *Provided* nevertheleſs, and be it enacted by the authority of this preſent parliament, That if any that is or ſhall be a recuſant ſhall ſubmit or reform him or herſelf and become obedient to the laws and ordinances of the church of *England*, and repair to the church, and continue there during the time of divine ſervice and ſermon according to the true meaning of the ſtatute in that behalf in the ſaid late queen's time made and provided, that then every ſuch perſon for and during ſuch time, as he or ſhe ſhall ſo continue in ſuch conformity and obedience, ſhall from thenceforth be freed and diſcharged of and from any the penalties and loſſes which the ſame perſon might otherwiſe ſuſtain and bear in reſpect, or by reaſon of ſuch perſon's recuſancy.

I conceive the proviſo in 1 *Jac. cap.* 4. doth diſcharge the penalty notwithſtanding the intereſt which the informer hath in the ſame.

1. Becauſe the conforming was before trial.

2. Becauſe by verdict the plaintiff acquires no debt or duty till judgment.

Mich. 37 & 38 *Eliz.* By all the juſtices of *England*, 1 *Roll. Rep.* 94. If *H.* be convicted of recuſancy by proclamation, and afterwards he conforms himſelf, he ſhall ſave the penalty incurred before, becauſe ſuch conviction is by the words of 39 *Eliz. cap.* 6. and 3 *Jac. cap.* 4. as ſufficient as if he had been tried by verdict recorded. 11 *Co.* 60. *Foſter*'s caſe.

Mich. 39 & 40 *Eliz.* 1 *Roll. Rep.* 94. Tenant in tail is convicted by proclamation, and dies, his heir ſhall not be ſubject to the penalty by 33 *H.* 8. *cap.* 39. becauſe no debt ariſes thereby, becauſe 'tis not a judgment; but if he had been convicted by verdict and judgment given thereon, he ſhould have been charged.

Object. This will diſcourage proſecutors.

Reſp. 'Tis no more loſs to him than if the recuſant had died, and the proſecutor did undertake this ſuit ſubject to the ſame hazard. 2. As proſecutors are not to be uſed hardly, ſo converts are to be encouraged, which made the lord chief juſtice *Coke* (in Dr. *Foſter*'s caſe) intercede for *Foſter* to the king after judgment, 2 *Bulſt.* 325. and did prevail, 1 *Roll. Rep.* 95.

Term.

Beſſey *verſus* Olliot & Lambert. *Error.* C. B. *Norff.*

False Imprisonment. 2 Jon. 214. Skin. 49. Antea 441.

THE plaintiff declares of a treſpaſs and falſe impriſonment, and detaining in priſon *quousq; finem fecit ad damnum* 100*l.* The defendants juſtify by virtue of a writ of *Non omittas* directed to the ſheriff of *Norfolk*, and a warrant to the bailiff of the duke of *Norfolk*, to whom execution of the ſaid warrant did appertain, who committed him to the defendant as keeper of the priſon of the liberty. The plaintiff replies, *De injuria ſua propria, Abſq; hoc*, that the bailiffs took him within the liberty. The defendant demurs, becauſe the plaintiff traverſes a thing not traverſable, and anſwers not the defendant's bar; and judgment was given in *C. B.* for the plaintiff.

The queſtion was this. A gaoler takes from the bailiff a priſoner arreſted by him out of the bailiff's juriſdiction, Whether the gaoler be liable to an action of falſe impriſonment? and the judges of the common pleas did all hold that he was; and of that opinion I am for theſe reaſons.

1. In all civil acts the law doth not ſo much regard the intent of the actor, as the loſs and damage of the party ſuffering; and therefore *Mich.* 6 *E.* 4. 7. *a. pl.* 18. *Treſpaſs quare vi & armis clauſum fregit, & herbam ſuam pedibus conculcando conſumpſit* in ſix acres. The defendant pleads, that he hath an acre lying next the ſaid ſix acres, and upon it a hedge of thorns, and he cut the thorns, and they *ipſo invito* fell upon the plaintiff's land, and the defendant took them off as ſoon as he could, which is the ſame treſpaſs; and the plaintiff demurred; and adjudged for the plaintiff; for though a man doth a lawful thing, yet if any damage do thereby befal another, he ſhall anſwer for it, if he could have avoided it. As if a man lop a tree, and the boughs fall upon another *ipſo invito*, yet an action lies. If a man ſhoot at buts, and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop

lop the ſallows * growing upon the river ſide, which acci- * P. 468.
dentally ſtop the water, ſo as your mill is hindered, an action lies. If I am building my own houſe, and a piece of timber falls on my neighbour's houſe and breaks part of it, an action lies. If a man aſſault me, and I lift up my ſtaff to defend myſelf, and in lifting it up hit another, an action lies by that perſon, and yet I did a lawful thing. And the reaſon of all theſe caſes is, becauſe he that is damaged ought to be recompenſed. But otherwiſe it is in criminal caſes, for there *Actus non facit reum niſi mens ſit rea.*

Mich. 23 *Car.* 1. *B. R. Stile* 72. *Guilbert* verſus *Stone.* Treſpaſs for entering his cloſe, and taking away his horſe. The defendant pleads, That he for fear of his life by threats of twelve men, went into the plaintiff's houſe and took the horſe. The plaintiff demurred; and adjudged for the plaintiff, becauſe threats could not excuſe the defendant, and make ſatisfaction to the plaintiff.

Hob. 134. *Weaver* verſus *Ward.* Treſpaſs of aſſault and battery. The defendant pleads, that he was a trained ſoldier in *London*, and he and the plaintiff were ſkirmiſhing with their company, and the defendant with his muſket *caſualiter, & per infortunium & contra voluntatem ſuam* in diſcharging of his gun hurt the plaintiff; and reſolved no good plea. So here, though the defendant knew not of the wrongful taking of the plaintiff, yet that will not make any recompence for the wrong the plaintiff hath ſuſtained.

2. The defendant here ſuffers no wrong but by his own act and will, for he was not compellable to be gaoler. And when a man takes an office, 'tis preſumed he knows of all the conveniences and inconveniences which attend it. And in this, as in all other contracts, he muſt take the bad with the good. *Vide Moor* 457. *pl.* 629. *Coot* verſus *Lightworth*, a ſtronger caſe.

3. As the gaols of the counties are incident to the office of the ſheriff, 4 *Co.* 34. *a.* ſo the gaols of liberties are incident to the lord of the liberty. And the gaoler is but ſervant to him, as the gaoler of the county gaol is to the ſheriff, and conſequently they underſtand one another, and are privy to each other's acts relating to the priſoners, in preſumption of law.

Object. By this way a ſubſequent ſheriff may be anſwerable for the tort of his predeceſſor.

Reſp. So it hath been reſolved for the reaſon before alledged.

* 2 *Cro.* 379. *Wythers* verſus *Henley.* Treſpaſs and falſe * P. 469.
impriſonment, and detaining him for a month. The de-

fendant justifies by virtue of a *Proceſs* out of the exchequer, directed to the defendant's predeceſſor, who took him by it, and alſo by virtue of a *Latitat*; and ſo the plaintiff was delivered over to the defendant. The plaintiff replies as to the exchequer *Proceſs*, there was a *Superſedeas*, and that the predeceſſor detained him after the *Superſedeas* delivered; and as to the *Latitat*, that the plaintiff in that action ordered the defendant's predeceſſor to diſcharge the now plaintiff. And upon this plea the defendant demurred; and adjudged for the plaintiff, becauſe this detaining by the now defendant is *quaſi* a new taking. And the ſubſequent ſheriff is bound to take conuſance of the acts of his predeceſſor. And 'tis uſual in other caſes for one man to anſwer for the acts of another.

5 *Co.* 100. *b. Penruddock's* caſe. *Quod permittat* againſt a feoffee for a nuſance erected by his feoffor.

2 *Cro.* 373. *Rippon* verſus *Bowles*, 1 *Roll. Rep.* 222. If I have a way over the land of *J. S.* who ſtopt it, and then let it to *J. D.* for years, I may have an action againſt the leſſee, and notice is not material. 3 *Cro.* 918. *Prince* verſus *Allington*.

4. The inconvenience which would otherwiſe fall out; for the defendant ſhould be thus impriſoned, and have no remedy for his wrong, for the bailiff may be dead, or the arreſt might be by a deputy, or perſon inſolvent; and no inconvenience on the other ſide, for he may take ſecurity that he ſhall be charged with no priſoners, but what ſhall be legally committed; or perhaps he may have a ſpecial action upon the caſe for committing the priſoner to his cuſtody, not having been duly arreſted.

But the other three judges reſolved, that the defendant the gaoler could not be charged, becauſe he could not have notice whether the priſoner were legally arreſted or not, and yet he is not compellable to take the priſoner into his cuſtody, and if he let him go he is liable to the plaintiff in the action's ſuit for the eſcape.

Afterwards *Maynard* ſerjeant moved farther, that the defendant is charged by the declaration for impriſonment *quouſque finem fecit pro deliberatione habend.* which is not anſwered, for the impriſonment only is juſtified, and not the *finem fecit*; and this exception was taken *Mich.* 19 *H.* 6. 35. *a. pl.* 73. 1 *Roll. Rep.* 264. *Slawley* verſus *Eveley*. But * P. 47c. we all * thought the plea good notwithſtanding that exception, becauſe he pleads Not guilty to all *præter* the impriſonment.

July

July 18. 1682. *Upon a Commiſſion of Review to the Court of Delegates.*

THE caſe was thus. *Thomas Boone* a merchant of *Exceſter* made his will, and died poſſeſſed of a perſonal eſtate of 100,000*l.* which lay in ſeveral places, and upon ſeveral ſecurities, left three ſons and five daughters, and gave his five daughters 3000*l.* a-piece; he gave his ſecond ſon *Chriſtopher Boone* 2000*l.* to be paid him at three ſeveral payments, and he gave him no more becauſe he found him improvident. He makes *John* his eldeſt ſon his ſole executor, who proves the will, and ſwears to bring in an inventory. A time to do it is aſſigned him by the judge of the prerogative court of *Canterbury*, and he not doing it, *Chriſtopher*, *June* 1680. takes out *Proceſs* and cites him before the judge of the prerogative court, who is ſatisfied that there needs no inventory. The will is proved *per Teſtes*, and 22 *May* 1680. ſentenced to be a good will. The cauſe why the judge thought an inventory not neceſſary was, becauſe the two firſt payments were made, and releaſes given, and then for the laſt by the will but 4*l. per centum* was due, and *John* allowed 6*l.* and alſo offered *Chriſtopher* the laſt payment. *Chriſtopher* not being ſatisfied with this, appeals to the delegates, who hear the whole cauſe, and ſentence that there was no need of an inventory at the plaintiff's inſtance. And now *Chriſtopher*, upon a commiſſion *ad revidend.* the ſentence of the delegates, prays that the ſentence may be reverſed, and that *John* may at his inſtance be compelled to bring in an inventory. His reaſons alledged by his counſel were. 1. There may be found another will wherein *Chriſtopher* may be executor, and then he will be to ſeek for the eſtate. 2. There may be ſpecialties taken by the teſtator in the name of *Chriſtopher*, and there being no truſt declared, the ſame will be conſtrued an advancement for *Chriſtopher*. 3. *John* the preſent executor may die inteſtate, and then the adminiſtration *de bonis non* will belong to *Chriſtopher*. 4. The ſtatute of 21 *H.* 8. *cap.* 5. ſays, That the executor ſhall make a true and perfect inventory. 5. *John* hath ſworn ſo to do, and no judge can diſpenſe with his oath. But notwithſtanding theſe arguments * the ſentence was confirmed by *North* lord chief juſtice of *C. B. Wyndham* juſtice, and myſelf, and Dr. *Newton*, and Dr. *Oxinden*; and as to the three firſt arguments there ſhall not be preſumed another will, ſpecialties or dying inteſtate; and as to the fourth, Deviſe.

* P. 471.

the intention of the ſtatute was for the advantage of legatees and creditors; and here the legacy is tendered, and no creditor complains; and 'tis found that *John* hath acknowledged in his hands 23000*l.* more than what will pay the debts and legacies. And by the ſtatute the inventory is to conſiſt only of goods, chattels, wares and merchandizes, and not of things in action; and this eſtate conſiſts moſtly of ſpecialties; and it would be very diſadvantageous to debtors (as this caſe is) to have their debts diſcovered when no neceſſity requires; and the ordinary doth frequently diſpenſe with a longer time to bring in an inventory, and ſo he may diſpenſe with the inventory upon cauſe; and ſuch inventory was diſpenſed with in the eſtate of ſir *Henry Martin* who died 1641. and in the caſe of *Vandeput* 1647. and ſo ſentence was confirmed.

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* P. 472. * Term. Mich. 34 Car. 2. B. R.

Put and Hardy *verſus* Sir William Rawſterne, Sir Thomas Beckford & al'.

Barr. 3 Danv. Abr. 724. p. 5. Skin. 48. Pollexf. 634. 2 Mod. 316. 3 Mod. 1. 2 Show. 211.

TROVER of divers goods. The defendant pleads an action of treſpaſs *Vi & armis* brought againſt them formerly, for taking and diſpoſing of the ſame goods; and upon Not guilty pleaded, a verdict for the defendants: judgment *ſi actio*. The plaintiff demurs; and adjudged for the plaintiff in this action of *Trover*, becauſe *Trover* and *Treſpaſs* are actions ſometimes of a different nature; for *Trover* will ſometimes lie where *Treſpaſs vi & armis* will not lie; as if a man hath my goods by my delivery to keep for me, and I afterwards demand them, and he refuſes to deliver them, I may have an action of *Trover*, but not *Treſpaſs vi & armis*, becauſe here was no tortious taking: and ſometimes the caſe may be ſuch, that either the one or the other will lie; as where there is a tortious taking away of goods, and detaining them, the party may have either *Trover* or *Treſpaſs*, and in ſuch caſe judgment in one action is a bar

in

in the other. And the rule for this purpoſe is, That whereſoever the ſame evidence will maintain both the actions, there the recovery or judgment in one may be pleaded in bar of the other; but otherwiſe not; and ſo this judgment will not claſh with *Ferrer's* caſe, 6 *Co.* which is good in law; for here it is to be preſumed that the plaintiffs in the firſt action had miſtaken their action; for that they had brought a *Treſpaſs vi & armis*, whereas they had no evidence to prove a wrongful taking, but only a demand and denial, and therefore the verdict paſſed againſt them in that action, and ſo were forced to begin in this new action of *Trover*. This judgment was given poſitively by *Pemberton*, *Jones* and myſelf, *Dolben hæſitante*.

* Hughs *verſus* Cornelius & al'. * P. 473.

TROVER for a ſhip and its tackle and furniture. Upon Not guilty pleaded a ſpecial verdict was, That one *William Gault* a denizen of *England* was owner of the ſhip at the time of the taking, and was *Dutch-built*, and taken in the war between the *Dutch* and *French* as a *Dutch* prize, and condemned for prize in the court of admiralty of *France*, and ſold, and that when the ſaid ſhip was taken as prize, there was amity between *England* and *France*. That the maſter was a *Dutchman* born, but a denizen of *England*. The mate was *Engliſh*, and eight mariners *Engliſh*, and two *Dutch* on board; That the ſaid ſhip was ſold to divers perſons by virtue of the ſentence of the admiralty of *France*, and that the plaintiff bought the ſaid ſhip from the perſons to whom the ſame was ſold as aforeſaid; that the defendants as ſervants of the ſaid *William Gault* took the ſaid ſhip from the plaintiff; and if the defendants be guilty, &c. Trover. Skin. 59. 1 Show. 143. 2 Show. 232.

The chief queſtion intended was, Whether this ſentence ſhall be examined by the common law? And reſolved, It ſhall not, becauſe though it be in another king's dominions, we ought to give credit to it, or elſe they will not give credit to the ſentences of our courts of admiralty; and the defendants are at no prejudice; for the way is, if they find themſelves aggrieved, to petition the king, who will examine the caſe, and if he finds cauſe of complaint, will ſend to his ambaſſador reſiding with the prince or ſtate where the ſentence was given, and upon failure of redreſs, will grant letters of marque and repriſal; and judgment was given for the plaintiff.

IN

Challenge.
Skin. 61, 76, 81.
2 Jon. 236.
2 Show. 218.

IN a trial at the bar in an information against *Ford* lord *Grey* of *Werke*, and others, for taking away the lady *Henrietta Berkley*, daughter of *George* earl of *Berkley*, no *Auguſt* 34 *Car.* 2. The counſel for the king challenged ſome of the jurors who were returned out of the county of *Surrey*, and the counſel for the lord *Grey* inſiſted, that the cauſe of the challenge ought to be preſently ſhewn, according to the ſtatute of 33 *E.* 1. called an ordinance for inqueſts, and to enforce them to do ſo, the counſel for the lord *Grey* challenged *tout à peravail*. But reſolved by the whole court, * That the king ought by that ſtatute to ſhew cauſe of his challenge, but not before all the jurors of the panel are called over; for if there be enough beſides thoſe which are challenged, no cauſe ſhall be ſhewn of that challenge; and thereupon the defendants relinquiſhed their challenge, and the jurors find the defendants guilty. Of this opinion is *Stamford Pl. Coron.* 162. *b.*

* P. 474.

December 18. About three o'clock in the afternoon, or a quarter paſt, died the right honourable ſir *Heneage Finch*, knight and baronet, lord *Finch* baron of *Daventry*, earl of *Nottingham*, and lord high chancellor of *England*, at his houſe in *Great Queen-ſtreet*.

December 20. 1682. The great ſeal was delivered to ſir *Francis North* knight, lord chief juſtice of the common pleas, and he became there lord keeper thereof.

Deſigny's *Caſe*.

Bail.
1 Danv. Abr. 680. p. 7.
2 Show. 221.

DESIGNY a merchant trading to *Jamaica*, ſpirited away the eldeſt ſon of one *Turbet*, who was a ſcholar at *Merchant-Taylors School*, and a hopeful youth. *Turbet* exhibited an information againſt *Deſigny*, and upon Not guilty pleaded he was found guilty at *Niſi Prius* before the chief juſtice *Pemberton*, the ſitting after *Trinity-Term* laſt, and this laſt *Michaelmas-Term* he appeared in court, and was fined 500*l.* and to lie in priſon till he paid it; ſince which fine impoſed, the priſoner procured a promiſe of a pardon of his fine; but the court laſt term being informed of it, and it being an offence of an heinous nature, directed the father of the child to bring a *Homine Replegiando*, and thereupon an *Elongatus* was returned, and the priſoner charged with it in priſon; and now *Deſigny* procured a letter

letter from the commissioners of the treasury, signifying his majesty's inclination of pardoning the fine, if the judges of *B. R.* met at the lord chief justice's chamber in *Serjeant's Inn* in *Fleet-Street*; and upon hearing counsel of both sides, we could not think it reasonable to bail the prisoner upon the *Withernam*, but did propose, that if the prisoner would bring * 1000 *l.* into court, we would give him his liberty, but the money to be forfeited if he produced not the child within six months, and gave him time to consider. The counsel for *Despigny* produced a case 16 *R.* 2. *Rot.* 16. *B. R. David Degais* versus *comit de Warwick*, and 5 *H.* 4. *Rot.* 25 *B. R. William Ufford* versus *Simon Brig*, and 12 *E.* 4. 4. but none of the cases reached to this case, wherein the defendant could pretend to no title to the child, because he hath been already convicted upon an information. * P. 475.

It was objected, that if an *Elongatus est* returned by the sheriff be conclusive to the defendant, so as he may not traverse it, then the defendant hath no remedy.

It was answered, 1. The defendant may bring an action upon the case for the false return, and if it be found for the plaintiff, the defendant in the *Homine Replegiando* may be bailed.

2. If the sheriff shall die before the issue tried, or the action brought, then the king may issue out a commission to inquire of the truth of the return, which inquisition taken by virtue of the said commission may be traversed by the defendant in the *homine replegiando*; and if the issue upon that traverse be found for him, he shall be bailed. *Vide Rast. Intr.* 402. and 403. And the *capias* in *Withernam* is no execution; but unless the defendant will confess the taking, and having the party in custody, he cannot be bailed, as appears by all the cases before cited.

In the first week of *January* 1682. died Sir *Thomas Twisden*, knight and baronet, one of the justices of *B. R. Grandævus senectute*. He continued judge to his death, but was dispensed with from sitting in court by reason of his age and infirmity, and was allowed, *ut dicitur*, 500 *l. per annum* pension from the crown; he died in *Kent*, of which county he was; none succeeded him at his death, because justice *Dolben* was sworn at his being dispensed with, about three years ago.

ON *Friday Jun.* 5. 1682. In a matrimonial cause between *Emerton*, alias *Hyde*, alias *Dunblave*, contr. *Emerton*, before commissioners of delegates, and to the former

mer commiſſioners a commiſſion of adjuncts being procured, all the judges who were therein named, and were then in town received a note ſubſcribed by the lord preſident of the council, the earl of *Radnor*, the duke of *Ormond*, lord ſteward of the houſhold, Sir *Leolin Jenkins* knight, principal ſecretary, * doctor *Hedges* and doctor *Saint John*, two doctors of the civil law, condelegates with the judges, in theſe words,

* P. 476.

We do appoint to meet and conſult about a day for the hearing and determining this cauſe upon the ninth day of *January* next, in the council-chamber at *White-hall*, between the hours of nine and eleven in the forenoon of the ſame day, and do require the proctors on each ſide to attend accordingly, dated this ſixteenth day of *December* 1682.

At the receipt whereof the judges were ſomewhat troubled, for that they heard nothing of it before, and it is to attend at *White-hall*, whereas all commiſſions of delegates, wherein any of the judges are named, have always been heretofore executed at one of the *Serjeants Inns*, becauſe the judges are conſtantly employed in the public affairs of the kingdom, in the buſineſs in their ſeveral courts, and other things which cannot be done ſo conveniently for the ſubjects elſewhere; and alſo every ſummons upon ſuch commiſſions uſed to be ſigned by one of the judges named in the commiſſion, which was herein wanting; and thereupon ſix of the judges repaired together to the lord keeper *North* to inform him of the matter, and to deſire his directions, who ſeemed to adviſe that we attend according to the note, but put the judges in hope that the ancient courſe ſhould be obſerved in hearing the cauſe; he told the judges that the like had been attempted in *Henry Martin*'s time, under pretence, that becauſe biſhops were named in the commiſſion, the commiſſion ought to be executed at *Doctors Commons*, but the king ordered, that the judges ſhould not ſtir from their uſual places of executing ſuch commiſſions. This *(ut dicitur)* did now ariſe from the promotion of Sir *Leolin Jenkins*, who is a civilian, and would favour his profeſſion as much as might be.

Poor.

ON *Wedneſday January* 17. 1682. at *Juſtice-Hall* at *Old-Baily* in *London*, a caſe was referred to the juſtices, which was this; one *Fletcher* a widow, having ſeveral children by her former huſband, who lived in the pariſh of St. *Buttolph* without *Aldgate*, which pariſh lies in two counties, *viz.* *London* and *Middleſex*, marries a ſecond huſband,

band, and then they put out the children to nurſe at *Enfield* in *Middleſex*, and then the mother dies, and after her the father-in-law; the nurſe applies herſelf for money to the pariſh of St. *Buttolph*, which hath one church-warden, and ſeveral overſeers of the poor of the county of *Middleſex*, and city of *London*, and the pariſh rates are ſeveral; the woman * lived and died in that pariſh which lies in *Middleſex*, who contended with the other part of the pariſh in *London*, and upon application to the quarter-ſeſſions in *Middleſex*, the juſtices of peace there ordered that the part of the pariſh which was in *London* ſhould go equal charge in relieving theſe children; and that part of the pariſh which is in *London* not ſatisfied with the order, applied themſelves to the gaol-delivery at the *Old-Baily*, and there reſolved by *Pemberton* chief juſtice, *Dolben* and other juſtices there, that without any particular uſage to the contrary, the pariſh in both counties ought to contribute their ſhares towards the relief of the children, becauſe the ſtatute of 43 *Eliz. cap.* 2. names only pariſhes; but in regard it was made appear that each part of that pariſh had diſtinct officers, and made diſtinct rates, and had uſed time out of mind to make diſtinct accounts to the juſtices of each county, the court did not look upon each diviſion as a ſeveral pariſh, and thereupon ordered, that that part of the ſaid pariſh which lies in *Middleſex* ſhall pay the nurſe, and provide for the future for the ſaid children. And it was reſolved, that no notice can be here taken of the place of the birth of the children, but of their laſt ſettlement, by 43 *Eliz. cap.* 2. becauſe they are only poor children, and not vagabonds; but they which are rogues or vagabonds within 39 *Eliz. cap.* 4. ſhall be provided for by the place where they were born.

* P. 477.

At the ſame ſeſſions a woman was indicted as acceſſory after to a burglary committed by one *Johnſon* in *Leiceſterſhire*. *Johnſon* had been tried and attainted, but procured his pardon, which hath been allowed; and now the woman prayed that ſhe might be diſcharged: but reſolved ſhe muſt plead to the indictment, for though if the principal have either his clergy, or be acquitted, or obtained his pardon before judgment, the acceſſory ſhall not be queſtioned; yet if the principal be attainted, the acceſſory muſt anſwer, though the principal be pardoned.

MEMORANDUM, the firſt day of this term *Edmond Saunders*, eſq; of the *Middle Temple* appeared at the *Chancery-Bar*, to a writ teſted in the vacation to command him to take the ſtate and degree of a ſerjeant at law, and was there ſworn, and immediately went from thence into the common pleas treaſury, and there in the preſence of all the judges, except *Levinz* who was ſick, made his count, and had his coif put on, and went to the common pleas bar, and made ſome motions, till the lord keeper came into the court of king's-bench, and then he was ſent for to the bar, and when he was there placed, the lord keeper made a very excellent ſpeech to him, and then he came into the court, his writ for chief juſtice was read, and having taken the oaths of obedience and ſupremacy, and oath of chief juſtice, he was placed chief juſtice of the ſaid court, in the room of Sir *Francis Pemberton*, who was the day before ſworn chief juſtice of the common pleas at his own deſire, for that it is a place (though not ſo honourable) yet of more eaſe and plenty, as the lord keeper ſaid in his ſpeech to *Saunders*.

Memorandum, January 25, 1682. At the importunity of one *Brunſkil*, who did formerly pretend himſelf able to advance the revenues of the crown, the king commanded all the judges to meet and conſider of his propoſals, which were in the general very extravagant, and totally rejected; but upon inquiry after the management of popular actions, we did find that the party who was plaintiff would frequently get an execution to levy his part, and either left the king's part unreceived, or made ſome private agreement with the ſheriff or defendant, or elſe the ſheriff received it, and never accompted for it, for that it was not in charge in the exchequer, and thereupon all the judges made this rule to be obſerved in all their reſpective courts.

* P. 479. * That all clerks of aſſiſe and aſſociates do return the *Poſteas* in all popular and penal actions and informations *qui tam, &c. ex officio*, into the reſpective offices whence they iſſue, and to receive their fees for the returning the ſame at the trial from the party for whom the verdict ſhall be given, and

and the master of the respective offices to whom the said *Postea* shall be returned by the said clerks of the assise shall send a note into the exchequer to the clerk of the estreats there to the intent the sheriffs may be charged therewith.

Duncomb and Singleton *versus* Sir William Walter. *Error in* C. B. Action upon the Case. *Middlesex.*

DUNCOMB and *Singleton* bring an action upon the case against Sir *William Walter*, executor of *David Walter*, esq; deceased, and set forth that the said *David Walter* the testator, 21 *November* 30 *Car.* 2. was indebted to *John Staley* in 1000 *l.* for so much by the said testator of the said *Staley* had and received, and so being indebted promised to pay the same; and also that the said *Staley* for five years last past, before the said 21 *November*, was a goldsmith, and got his livelihood by buying and selling, and became indebted to *Pigot* in 200 *l.* to *Clayton* in 600 *l.* and being so indebted, the said 21 *November* began to conceal himself in his house with an intention to defraud his creditors, and became thereby a bankrupt within the meaning of divers acts of parliament. That 20 *Febr.* 31 *Car.* 2. at the petition of *Pigot* and other creditors, exhibited to the lord chancellor, a commission issued out to certain commissioners to inquire thereof, who after the death of the testator, viz. 14 *May* 31 *Car.* 2. by indenture assigned *Staley*'s estate to the plaintiffs, by virtue whereof the plaintiffs are intitled to the said 100 *l.* And the plaintiffs farther declare upon an *Indebitatus Assumpsit* for another 1000 *l.* by the defendant received for the use of the testator. Upon *Non assumpsit* pleaded, the jury find a special verdict, *viz.* that before the plaintiffs original writ sued out, *viz.* 1 *November* 1678. and by the space of five years then last past, the said *Staley* was a trader, and during that time became indebted to the said *Pigot* in 200 *l.* to *Elizabeth Clark* in 1000 *l.* and to the said *Martha Clayton* in 6000 *l.* The said *Elizabeth Clark* made her will 5 *July* 1677. and made *John Crew*, esq; her executor, and died, after whose * death, and before *Crew*'s probate of the said will, *viz.* 6 *November* 1678. the said *Crew* prosecuted a bill of *Middlesex* against the said *John Staley* and *William Staley*, returnable *die Jovis prox' post quindenam Sancti Martini*, for the said 1000 *l.* on which day he was arrested, and put in sufficient security for his appearance, and so was delivered out of custody. That afterwards, viz.

Bankrupt. 1 Danv. Ab. 688. p. 1. 3 Lev. 57. 1 Vent. 370. Skin. 22, 87. 2 Show. 253.

* P. 480.

viz. 18 *November* 1678. which was before the return of the ſaid writ, the ſaid *John Crew* proved the ſaid will. That the ſaid 18 *November* 1678. the ſaid *David Walter* received the ſaid 1000 *l.* from the ſaid *John Staley*, being before that time due to the ſaid *David Walter* upon bond and judgment. That before the return of the ſaid bill of *Middleſex*, *viz.* 26 *Nov.* 1678. the ſaid *John Staley* voluntarily rendered himſelf in diſcharge of his bail in the ſuit againſt him by the ſaid *John Crew*, and was then committed to the priſon of the *Marſhalſea* for want of bail. That the ſaid debt due to the ſaid *Elizabeth Clark* was a juſt and true debt, and the ſaid *John Staley* being ſo in cuſtody, 14 *Febr.* 33 *Car.* 2. did remain ever ſince his commitment, the ſaid debt not being paid or compounded for. That the ſaid *Staley* was, and yet is a ſubject of the king, born at *Weſtminſter*. That 20 *Febr.* 31 *Car.* 2. at the petition of the ſaid *John Pigot* on his and others behalf, a commiſſion iſſued out of the chancery *prout*, and that the commiſſioners 14 *May* 31 *Car.* 2. aſſigned over the eſtate of *Staley* to the plaintiffs *prout*. That the ſaid 100 *l.* mentioned by the ſaid *David Walter* had and received, is the ſame mentioned in the declaration. But whether upon the whole matter the ſaid *John Staley* was a bankrupt 18 *November* 30 *Car.* 2. *penitus ignorant & petunt adviſamentum Curiæ*, and if he was then a bankrupt they find for the plaintiff, and if not, then for the defendant. And judgment was given in *C. B.* for the defendant; and now the plaintiff brings a writ of error, and aſſigns the general error.

The caſe in ſhort is, *Staley* being a trader becomes indebted by bond and judgment to *David Walter* in 1000 *l.* and to *Elizabeth Clark* in 1000 *l.* and to ſeveral other perſons in ſeveral other ſums. 5 *July* 1677. *Elizabeth Clark* makes her will, and *John Crew* her ſole executor and dies. 6 *November* 1678. *Crew* arreſts *Staley* for the 1000 *l.* who immediately puts in ſufficient bail. 18 *November* 1678. *Staley* pays *David Walter* the 1000 *l.* and then the ſame day renders himſelf to priſon in diſcharge of his bail, and lies in priſon to the time of the action, which is above two years,
* P. 481. 20 *February* * 1678. a commiſſion iſſues 14 *May* following, the commiſſioners aſſign *Staley*'s eſtate to the plaintiff; and the ſole queſtion is, whether *Staley* was a bankrupt on 6 *November* 1678. which was the day of his arreſt; for if ſo, then it is for the plaintiffs, becauſe he paid the 100 *l.* to *David Walter* after he became a bankrupt; but if he did not become a bankrupt on that day, then it is for the defendant.

The

The words of the ſtatute of 21 *Jac. cap.* 19. are, *Being arreſted for debt, ſhall after his or her arreſt lie in priſon two months or more upon that or any other arreſt, or other detention in priſon for debt. And in the ſaid caſes of arreſt or lying in priſon for ſuch debt or debts, ſhall be adjudged a bankrupt from the time of his or her ſaid firſt arreſt.*

Dyoſſe for the defendant in the writ of error. Here is an arreſt and lying in priſon two months after, and ſo within the words of the ſtatute.

1. *Object.* Here is not an immediate lying in priſon upon the arreſt, for here was bail put in.

Reſp. The ſtatute diſtinguiſhes not between the caſes where bail is, and where it is not put in, and though the caſe may not be within the ſecond clauſe, it will be within the firſt; for here was lying in priſon two years.

2. *Object.* A man cannot be a bankrupt, but where there is a real debt due; but here *Crew* had not proved the will, and till then he could not claim the debt of the teſtator at the time of the arreſt.

Reſp. The money is due to the executor before probate, for he may releaſe, as *Middleton*'s caſe is, 5 *Co.* 28. *a.* And probate is only an allowance of the executorſhip, and an executor may before probate bring a writ, but not declare, 1 *Roll. Abr.* 917. *A. pl.* 2. And here the will was proved before the return of the writ; and where it is ſaid an executor cannot ſue before probate, it is meant he cannot ſue effectually.

This ſtatute doth not diſtinguiſh between a legal and illegal arreſt; and if a bankrupt ſhould not become ſo from the firſt time of his arreſt, he might make over his eſtate, and then deliver himſelf up to priſon in diſcharge of his bail, and ſo elude the ſtatute.

Walcot ſerjeant for the defendant. The queſtion is, from what time *Staley* ſhall be accounted a bankrupt; and I conceive only from the time that he rendered himſelf in diſcharge * of his bail, *viz.* 20 *November* 1678. A tradeſman's being arreſted barely, makes not a bankrupt. *Et adjournatur.* * P. 482.

IN the caſe of the town of *Nottingham*, it appeared, that at a common council of the ſaid town, it was ordered that there ſhould be a ſurrender made of the charter to the king, and thereupon the mayor purſuant to the ſaid order did take out of the town-cheſt the ſaid charter, and ſurrendered the ſame accordingly; and ſo it fell out, that in the ſaid charter was contained not only the franchiſe of the corporation,

tion, but also the grant of certain common to the inhabitants, and because the surrender was against the minds of a great number of the inhabitants who were discontented, and were opposers of the present government of the kingdom, they took advantage of this omission, and exhibited an information into *B. R.* and desired the master of the crown-office (in whose name the information was exhibited) to file it, but in regard it was matter of state, and of great concern, he this term desired the directions of the court, who ordered that the attorney-general should be made acquainted therewith, who at another day appeared, and refused to meddle therewith, and so it was left to Mr. *Astry* to file or not to file, at his discretion, for the court would not use any compulsory means for filing it, in regard they could not know whether such an information was necessary or no; and it is properly the office of the king's attorney to manage informations of such concernment.

Row *versus* Sir Thomas Clargis, Knight, *for Words. Error in* C. B.

Words.
1 Dany. Ab. 86. p. 29.
3 Mod. 26.
3 Lev. 30.
Skin. 68, 88.
2 Show. 250.

THE plaintiff in *C. B.* declares, that he was such a day deputy-lieutenant for the county of *Middlesex*, one of the king's privy council for the realm of *Ireland*, and stood for to be chosen burgess for the parliament at *Christ-Church* in *Com. Hants*, and that the defendant spake these words of him, *viz. He is a Papist.* Upon Not guilty pleaded, verdict for the plaintiff, and judgment; and now *Clargis* brought a writ of error, and judgment affirmed by all the four justices, *viz. Saunders*, *Jones*, *Dolbin* and myself, and resolved,

* P. 483. 1. That the words taken abstractively are actionable, * because the acts of parliament of 23 *Eliz.* 3 *Jac.* and 25 *Car.* 2. do expose a papist to several penalties and incapacities. 2. *A fortiori*, as the words have relation to the quality of the person, for a deputy lieutenant is an officer of great trust; and though 'twas objected, that 'tis not an office of profit, and so no prejudice to lose it: It was answered, That 'tis of as much profit as a justice of peace; and yet the words spoke of a justice were adjudged actionable; and the times alter the law when the sense of words alter; for though formerly (*papist*) was not actionable, yet now 'tis grown to be a word of more reproach. So healer of felons was not actionable till it appeared to be a concealer of felons: and to say of an attorney he is a knave, is actionable, though anciently *knave* was no more but servant. It was objected farther,

farther, that to have the word *papiſt* to bear an action would be a means to diſcourage proſecution of papiſts. To which it was anſwered, That railing is no proſecution; and we muſt not puniſh the innocent, becauſe we cannot exceed in our expreſſions of the nocent.

And the law doth alter with the time; for before 21 *E.* 3. 23. an infant could not bring an appeal; and we find no precedent before that time of an appeal ſo brought, but now 'tis frequent; and judgment was affirmed.

Roſkelley *verſus* Rebecca Godolphin.

Mich. 34 Car. 2. Rot. 599. B. R.

DEBT upon an obligation dated 24 *July* 18 *Car.* 2. againſt the defendant, adminiſtratrix of *John Godolphin*, *durante minori ætate* of *Rebecca* his daughter, for 1681. The defendant pleads, That the teſtator became bound by obligation, dated 18 *May* 26 *Car.* 2. in 6000*l.* to *Brook* and *Wallis* (truſtees of *Rebecca* the defendant, upon her marriage with the ſaid *John Godolphin*) upon condition to pay to the defendant herſelf 3000*l.* within fourteen days after the death of the ſaid *John*, if ſhe ſhould ſurvive him, and ſays that ſhe ſurvived him, and that ſhe hath not aſſets *ultra* 1000*l.* which ſhe retains towards ſatisfaction of the ſaid 3000*l.* The plaintiff demurs generally, and I conceive judgment ought to be given for the defendant, and that it is a good plea. Executor. 3 Danv. Abr. 386 p. 7. 2 Show. 403. Skin 214.

1. I do agree, that if *John Godolphin* had made a ſtranger executor, there muſt have been an actual payment, or judgment upon the bond before this action brought, or elſe *pleinment adminiſtre* had not been a good plea. * P. 484.

2. If the payment here had been to be made to *Brook* and *Wallis*, though in truſt for the feme, retainer could not have been pleaded, though the law ſeems contrary, 3 *Cro.* 754. *Huiſh* verſus *Philips*, where a bond was to *A.* to the uſe of *B.* conditioned to pay *B.* money, 'twas a good plea, that the obligor tendered the money to *B.* becauſe he was in a manner privy to the obligation, and ſo is *Co. Lit.* 209. *a.*

3. But here though the bond be to *Brook* and *Wallis*, yet the condition is that the executors of *John Godolphin* ſhall pay to the wife herſelf the money, and ſhe is adminiſtratrix herſelf; now ſhe cannot pay to herſelf, and therefore the payment muſt be by way of retainer.

Object.

Object. She is but adminiſtratrix *durante minori ætate* of *Rebecca*, ſo we cannot retain.

Reſp. She may ſell goods for payment of debts, 5 *Co.* 29. *Prince's* caſe, & *eadem ratione* ſhe may retain to pay herſelf, *Hob.* 250. *Bryars* verſus *Goddard*, adminiſtrator *durante minori ætate* may retain.

Dominus Rex *verſus* Higgins & al'. *Trial at Bar.* Worceſter.

1 Mod. Rep. 439.

Challenge. 1 Vent. 366. Skin. 91, 101, 105.

2 Lev. Rep. 446.

AN information in nature of a *Quo Warranto* exhibited againſt certain perſons being citizens of the city of *Worceſter* for uſing ſeveral liberties and franchiſes within the ſaid city, ſetting forth, that king *James* 2 *October* 19 *Jac.* did incorporate the ſaid city of *Worceſter* by the name of mayor, aldermen and citizens of the city of *Worceſter*. That there ſhould be a mayor, ſix aldermen, one ſheriff, two chamberlains, twenty-four (of which the mayor and aldermen ſhould be ſeven) to be capital citizens and counſellors, and forty-eight capital citizens, whereof the chamberlains ſhould be two, and that the twenty-four and forty-eight ſhould be called the common council, and that the aldermen ſhould be elected out of the twenty-four. That upon the death or removal of any of the twenty-four, their place ſhould be ſupplied out of the forty-eight. That the defendants and ſeveral others named in the information 1 *November* 32 *Car.* 2. * to the day of exhibiting the information, without any authority did claim to be mayor, aldermen, ſheriff and citizens of the number of twenty-four and forty-eight, and by all that time did uſurp upon the king, &c.

* P. 485.

Higgins pleads, that *die Lunæ poſt Feſtum Sancti Bartholomæi Anno* 32 *Car.* 2. he was choſen mayor, and the ſecond *Monday* after *Michaelmas* took his oath for execution of his office *prout* letters patent require, and ſo juſtifies, &c. The king's attorney general replies, That when elected mayor he was not of the twenty-four, and thereupon takes iſſue.

Edward Cookſey another of the defendants pleads, That he 9 *July* 13 *Car.* 2. by the commiſſioners upon the act of corporations was made one of the twenty-four; and that on *Monday poſt Feſtum Sancti Bartholomæi* 32 *Car.* 2. he was elected alderman and ſworn, &c. The attorney general replies, That when the defendant was elected alderman he was not of the twenty-four; and iſſue thereupon.

Edmund Oſdnal another defendant pleads, That he being one of the forty-eight, was 16 *Jan.* 1663 choſen of the twenty-

twenty-four. The attorney general replies, That when elected of the twenty-four he was not of the forty-eight; and iſſue thereupon.

John Millington, *William Hughes* and others plead, That 29 *March* 1677, &c. they were choſen of the forty-eight. The attorney general replies, That when they took the oaths to execute the office of one of the forty-eight, they did not ſubſcribe the declaration *prout* the act of parliament requires. The defendants rejoin, that they did ſubſcribe; and iſſue thereupon; and a trial at the bar upon all theſe iſſues.

The counſel for the defendants took a challenge to the array, becauſe the jury was out of the city of *Worceſter*; and it being ſuggeſted by the attorney general upon the roll, that the ſheriff of the ſaid city was one of the defendants, he prayed a *Venire facias* to the coroners, and that there were two coroners, and though both the ſaid coroners were mentioned upon the record to have returned the panel, yet that in truth, but one only, *viz. Trimnel*, did return the ſame, and ſo not good; but the court unanimouſly reſolved, that the challenge ought not to be allowed, becauſe it appears by the record itſelf, that both did return the ſame; and that no challenge contrary to the record ought to be allowed.

Another challenge was taken to the polls, becauſe the jurors had not any freehold within the city; and this challenge was debated by all the four judges, and it ſeemed to them all, that it can be no good challenge, becauſe the * P. 485. ſtatute of 2 *H.* 5. *cap.* 3. doth not extend to this caſe, for that is only in cauſes between party and party; nor doth 35 *H.* 8. *cap.* 6. reach thereto, becauſe that ſtatute cannot extend to cities and corporations, but to ſheriffs of counties at large; for if a panel made in corporations, muſt have freehold jurors, they muſt have likewiſe ſix hundredors, which cannot be in any corporation of *England*; and ſo 27 *Eliz. cap.* 6. But the jurors of corporations are to be at the common law; and though it is ſaid 3 *Cro.* 413. in *Blunt*'s caſe, that there ought to be ſome freeholders, that cannot be intended in corporations, for in ſome corporations there are no freeholders at all, and ſo juſtice would fail; and by conſtant practice in all the trials at *Guildhall*, *London*, by *Niſi prius*, no ſuch challenge was ever made or allowed, and therefore it would be very miſchievous after ſo long practice to the contrary to admit this challenge; and yet nevertheleſs, becauſe the counſel for the defendants were not well ſatisfied with this reſolution, I was deſired by the other

judges of the court to know the opinion of the judges of the court of common pleas, and I diſcourſed with them, and propounded the challenge to them; and *Pemberton* chief juſtice, *Wyndham* and *Charleton* (*Levinz* being abſent *propter agritudinem*) did clearly concur with us, and I returned their anſwer ſo to the court; and for not allowing theſe two challenges, the defendants counſel preferred a bill of exceptions, which they deſired might be ſigned by us, that they might be afterwards enabled to alledge the ſame for error in parliament, if occaſion ſhould be.

Vide 17 *Aſſ.* 15. In an inqueſt in an action of debt it was not allowed for a challenge, that the jurors had not ſufficient land, becauſe the freehold was not in demand.

Note; In the caſe of ſir *Henry Vane* it was reſolved 14 *Car.* 2. *B. R.* That a bill of exception doth not extend where priſoners are indicted at the ſuit of the king. *Syderfin Rep.* 85.

* P. 487. * Hitchins *verſus* Stevens.

Attornment. 1 Danv. Abr. 610. p. 10. 2 Jon. 217, 232. 2 Show. 233.

DEBT for rent. The plaintiff ſets forth, that *A.* was poſſeſſed of the lands for the term of ninety-nine years by the demiſe of *B.* and afterwards *A.* demiſed the premiſſes for twenty-one years to the defendant, who entered and was poſſeſſed, and afterwards granted the reverſion to the plaintiff, and that ſo much was in arrear, *unde actio accrevit.* Upon *Nihil debet* pleaded, and verdict for the plaintiff, it was moved in arreſt of judgment, that the plaintiff had not alledged in his declaration, that the defendant did ever attorn to the plaintiff's grant of the reverſion. And reſolved good enough without it after a verdict, 2 *Roll. Rep.* 489. for 'tis apparent, that if the plaintiff had not given the attornment in evidence, he muſt have been nonſuited; and whereſoever it may be preſumed that any thing muſt of neceſſity be given in evidence, the want of mentioning of it in the record will not vitiate it after a verdict; and ſo judgment was given for the plaintiff.

6 Laws Rep. 52.

The King *againſt* The Inhabitants of Bitton. Glouc.

Fences. 2 Show. 255.

RESOLVED by *Saunders* chief juſtice, That cutting down of timber-trees by unknown perſons *noctanter*, is not within the ſtatute of *Weſtm.* 2. *cap.* 46. for the words of the ſtatute are, *Foſſatum & ſepem proſtraver'*.

Smith

Smith *verſus* Batterton.

TRESPASS *quare vi & armis* the defendant flung down certain ſtalls of the plaintiff in the market-place of *Highworth* in *Com. Wilts.* Upon Not guilty pleaded, verdict was found for the plaintiff, but damages were given under 40*s.* and upon the ſecondary's refuſing to tax coſts, as being a caſe within 22 & 23 *Car.* 2. *cap.* 5. *pl.* 236. it was moved by the plaintiff's counſel that coſts might be taxed; and upon debate it was reſolved by the whole court, that the plaintiff ſhall have his ordinary coſts, becauſe the ſtatute ſhall be intended to reach only to ſuch actions in which the * freehold may apparently come in debate; but in this caſe the action is not *Quare clauſum fregit*, but only for deſtroying a chattel, and the freehold cannot come in debate, any more than if a man ſhall take his ſword out and run a coach-horſe into the guts, whereby he died, and the owner ſhall bring an action *Vi & armis* for it, and recover under 40*s.* damages, yet he ſhall have his full coſts.

Coſts. 2 Danv. Ab. 222. p. 13. 2 Jon. 232. Skin. 100. 2 Show. 258.

* P. 488.

Sands *verſus* Exton.

The whole Proceedings of this Caſe are as follow.

CAROLUS Secundus Dei Gratia, &c. Univerſis & ſingulis Vice-Admirallis Juſticiariis ad pacem Majoribus Vicecomitibus Ballivis Mareſchallis Conſtabulariis cæteriſque Officiariis & Miniſtris noſtris tam infra Libertates & Franchesias noſtras quam extra ubilibet conſtitutis & præſertim Willielmo Jones Gener. ſupremæ Cur. Admiralitatis noſtræ Angliæ Mariſcall. ejuſque Deputato ſalutem. Cum dilectus noſter Richardus Lloyd Miles Legum Doctor Surrogatus dilecti noſtri Leolini Jenkins Militis Legum etiam Doctoris in Suprema Curia noſtra Admiralitatis Angliæ præd. locum tenen. Commiſſariique Generalis ac Curiæ præd. Judicis & Preſidentis legitime conſtituti rite & legitime proceden. ad petitionem dilectorum noſtrorum Thomæ Exton Militis Legum Doctoris Advocati noſtri Generalis & Samuelis Franklin Arm. Procuratoris noſtri Generalis præſentat dicto Domino quendam Ordinem ſive reſcriptum quoddam per nos fact. tenoris ſequen. *viz.*

Prohibition. Skin. 91. 2 Show. 300.

* P. 489. * *At the Court at* Whitehall, *Dec.* 13, 1682.

PRESENT

The King's Moſt Excellent Majeſty.

Lord Archbp. of *Canterbury.*	Earl of *Craven.*
Lord Preſident.	Earl of *Conway.*
Lord Privy Seal.	Earl of *Rocheſter.*
Duke of *Albemarle.*	Lord Viſcount *Fauconberg.*
Duke of *Ormond.*	Lord *Finch.*
Duke of *Beaufort.*	Lord Biſhop of *London.*
Lord Chamberlain.	Lord Chief Juſtice *North.*
Earl of *Cheſterfield.*	Mr. Secretary *Jenkins.*
Earl of *Sunderland.*	Mr. Chancellor of the *Exchequer.*
Earl of *Clarendon.*	
Earl of *Bath.*	Mr. *Godolphin.*

WHEREAS the governor and company of merchants of *London*, trading to the *Eaſt-Indies*, did repreſent to his majeſty in council, that the ſhip *Expectation*, alias *Commerce* of *London*, was at *Graves-End* bound for the *Eaſt-Indies* to trade within the limits of the ſaid company's charter; his majeſty having taken into conſideration that the *Eaſt-India* company have ſeveral contracts, treaties and articles of peace with ſeveral princes in the *Eaſt-Indies*, and that in caſe ſuch are permitted to trade who have no ſuch leagues or treaties with the ſaid princes, acts of hoſtility may enſue, and the trade of the nation much prejudiced, was pleaſed to order the right honourable the commiſſioners of the admiralty to cauſe the ſaid ſhip to be ſtopped until ſhe ſhall be cleared, or that the owners ſhall give ſecurity in the court of admiralty, where his majeſty hath directed a proſecution of the ſaid ſhip.

It is this day ordered by his majeſty in council, That his majeſty's advocate general and proctor do take care forthwith that proceſs be iſſued againſt the ſaid ſhip *Expectation*, alias *Commerce*, for ſtaying of her until ſecurity be entered in the court of admiralty, that ſhe ſhall not go nor trade with any infidel country within the limits of the *Eaſt India* company's charter without his majeſty's licence.

Francis Guyn.

Et

* Et allegan. dictam navem ſine authoritate vel mandato * P. 490.
noſtro propediem eſt vela datur. ad partes Indiæ Orientalis ad ibidem mercaturam exercend. infra limites Diplomatis ſive Chartæ (Anglicè *the charter)* Societatis Mercatorum de London. negotian. ad Indias Orientales ejuſdem Mercatoribus authoritate nr'a conceſſ. in præjudicium dicti Diplomatis & contra intentionem ejuſdem & præjudicium mercaturæ Nationis noſtræ Angliæ prout ex Reſcripto noſtro plenius apparet & peten. Warrantum decerni contra dictam navem ejuſque apparatus & acceſſ. eandemq; navem ejuſque &c. vigore ejuſdem arreſtand. & ſub ſecuro cuſtodiend. arreſto donec & quouſque cautum fuerit in ſuprema Curia noſtra Admiralitatis præd. interpoſit' ut dicta navis non procedat nec mercaturam exerceat in aliquibus Regionibus ſive Ditionibus aliquorum Principum & populorum Infidelium Chriſtianæ Religioni adverſ. infra limites dicti Diplomatis ſive Chartæ dictæ Societatis Mercatorum de London. negotian. ad Indias Orientales exiſtentium abſque licentia ſive authoritate noſtra in ea parte prius obtenta juxta Reſcriptum ſive Ordinem noſtrum prædict. decreverit dictam navem *the Expectation*, alias *the Commerce of London*, arreſtand. fore & ſub ſalvo & ſecuro cuſtodiend. arreſto prout per Advocatum & Procuratorem noſtrum General. præd. petitur Vobis igitur conjunctim & diviſim committimus & firmiter injungendo mandamus ſtricteque præcipimus quatenus non omittatis propter aliquam Libertatem vel Franchef. quin realit' arreſtetis ſeu arreſtari faciatis peremptorie dictam navem *the Expectation*, alias *the Commerce of London*, ejuſque apparatus & acceſſ. ubicunque eadem invenietis eandemque ſic capt. & arreſtat. ſub ſalvo & ſecuro cuſtodiatis arreſto donec & quoſque cautio fuerit interpoſita in Suprema Curia noſtra Admiralitatis præd. ut dicta navis non procedat nec mercaturam exerceat in aliquibus Regionibus ſive Ditionibus aliquorum Principum & Populorum Infidelium Chriſtianæ Religioni adverſ. infra limites dicti Diplomatis ſive Chartæ dictæ Societatis Mercatorum de London. negotian. ad Indias Orientales exiſten. abſque licentia ſive authoritate noſtra in ea parte prius obtent. juxta Reſcriptum noſtrum ſive Ordinem prædict. Et hoc nullatenus omittatis Dat. Londini in Suprema Curia noſtra Admiralitatis præd. Sigillo ejuſdem magno decimo tertio die Decembris 1682. Regnique noſtri triceſimo quarto. Orlando Gee Regiſterius. Concordat cum Regiſterio Ita teſtor Ed. Parre Notarius publicus.

Die

* P. 491. * Die Martis 19 Decemb. 1682. inter horas quartam & ſextam poſt Meridiem ejuſdem diei coram venerabili & egregio Viro Domino Richardo Lloyd Milite Legum Doctore Surrogato honorandi viri Domini Leolini Jenkins Militis Legum etiam Doctoris in Suprema Curia Admiralitatis Angliæ locum tenentis Generalis & Commiſſarii dictæque Cur. Judicis & Præſidentis legitime conſtituti in Cœnaculo infra Hoſpitium D'norum Advocatorum London. præſent. Edwardo Parre Notario publico, &c.

Sereniſſimus Dominus noſter Rex contr. Navem quand vocat. *the Expectation*, alias *Commerce of* London.

WHICH day the right worſhipful Sir *Thomas Exton* the king's advocate, and *Samuel Francklin*, eſq; his majeſty's proctor, did on the behalf of our ſovereign lord the king propoſe that if captain *Sands*, or any of the parties, having any intereſt in the ſaid ſhip and lading will give ſecurity into this court in the ſum of 40,000 *l.* that the ſaid ſhip ſhall not go nor trade with any infidel country within the limits of the *Eaſt-India* company's charter without his majeſty's licence, purſuant to any order of the king and council lately preſented to this court bearing date the 13*th* of this preſent month of *December*, or otherwiſe will take out a commiſſion of appraiſement to appraiſe the ſaid ſhip and the goods laden on board her, and give in bail in the double value of the ſaid ſhip and goods according to the ſaid appraiſement, in caſe they will not unlade the ſaid goods, or if they will take their goods out of the ſaid ſhip (which the king's advocate and proctor offered them to do if they ſhould think fit) then in the double value only of the ſaid ſhip, and of her tackle, apparel and furniture, that in ſuch caſe the ſaid ſhip may be decreed to be releaſed from the arreſt ſhe now lies under, otherwiſe they prayed that ſhe may ſtill be continued under the ſaid arreſt until ſuch bail be given as aforeſaid in the preſence of the ſaid captain *Sands* and Mr. *Chapman*, his proctor, diſſenting and alledging, offering and praying as in the former act of this court is contained,

Whereupon the judges declared and offered, that any of the perſons concerned in the ſaid goods and lading may unlade and take their goods out of the ſaid ſhip, if they pleaſe, and that, if they will ſo take them out, he will require bail

* P. 492. in * no greater ſum than in the double value of the ſaid ſhip, and

and of her tackle, apparel and furniture, according to the appraiſement to be made as aforeſaid; and farther declared that if captain *Sands* and the perſons chiefly concerned with him in this buſineſs will affirm upon oath, that they did not deſign or intend to go or trade, nor will go or trade with the ſaid ſhip in any infidel country within the limits of the *Eaſt-India* company's charter without his majeſty's licence, that then he will take their juratory caution, and will decree the ſaid ſhip to be releaſed from the ſaid arreſt without requiring any other or further caution or ſecurity; which they refuſing, and alſo refuſing to give in bail as aforeſaid, the judge decreed that the ſaid ſhip with her tackle, apparel and furniture ſhould ſtill continue under the arreſt of this court until ſuch bail be given as above required. *Concordat cum Originali quod atteſtor Tho. Bedford publ. dictæ Curiæ Regiſterii Deputatus.*

Upon theſe proceedings *Sands* moves for a prohibition upon the ſuggeſtion enſuing, *viz.*

Anglia, ſſ. Memorand. quod die Martis prox. poſt Octabas Sancti Hillarii iſto eodem Termino coram Domino Rege apud Weſtm. Ven. Thomas Sands Magiſter cujuſdam Navis, vocat. *the expectation*, alias *commerce of* London. Et dat Cur. Domini Regis nunc hic intelligi & informari quod in Statuto in Parliamento D'ni Richardi nuper Regis Angliæ Secundi poſt Conqueſtum apud Weſtm. in Com. Midd. Anno Regni ſui decimo tertio tent. inter alia inactitat. exiſtit quod Admiralli & eor. deputat. de aliqua re infra Regnum Angliæ niſi ſolummodo de re ſuper mare prout tempore Domini Edwardi nuper Regis Angliæ Progenitor. dicti Domini Regis Richardi Secundi debite uſum fuit nullatenus intromittent Quodq; in Statuto in Parliamento dicti Domini Regis Richardi Secundi poſt Conqueſtum apud Weſtm. Anno Regni ſui decimo quinto tent. (inter alia) declarat. ordinat. & ſtabilit. exiſtit quod de omnibus contractibus placitis & querelis ac de omnibus rebus quibuſcunque fact. ſeu emergen. infra corpus Com. tam per terram quam per aquam Ac etiam de Wrec. Maris Cur. Admiralitatis nullam habeant Cognitionem Poteſtatem Juriſdiction. ſed quod omnia hujuſmodi contract. placita & querelæ ac omnia al' emergen. infra corpus Com. tam per terram quam per aquam (ut ſupradictum eſt) necnon Wrec. Maris forent triat. terminat. diſcuſſ. & remediat. per leges terræ & non * coram Admi- * P. 493.
rallo nec per Admirallum nec ejus locum tenen' quoviſmodo

prout

prout per eundem Actum inter alia plenius liquet & apparet Cumque omnia & singula placita & cognicion' placitor' & triation' validat' in lege aliquatum Literarum Patentium Domini Regis nunc vel Progenitor' suorum sub magno sigillo suo Angliæ confect' ac Statutorum hujus Regni Angliæ interpretation' construction' & expositio' ac cognition' triation' punition' & determination' omnium transgress. criminum & malefic' & offensar' & al' rerum quarumcunque super terram & non sup' altum mare fact. commiss. emergen' seu perpetrat' ad Dominum Regem nunc & Coronam suum Regiam specialit' spectent & pertinent Ac per legem terræ hujus Regni Angliæ coram ipso Rege vel Justiciariis suis aut al' Judicibus temporalibus in Cur' Regis & non coram Admiralio nec per Admirallum vel ejus Deputat. sive locum tenen' quovismodo triari terminari & discuti debeant & semper hactenus consuever.'

Quodque idem Thomas Sands 1 Dec. nunc ult. præterit. & diu antea super terram & infra corpus Com' scilicet apud London' præd. in Paroch. beatæ Mariæ de Arcubus in Warda de Cheap possessionat. fuit de prædict. Nave, vocat. *the Expectation* alias *Commerce*, cum apparat. & accession' adinde spectan' & pertinen' ut de bonis & catallis suis propr' Et sic inde possessionat. existen' idem T. Sands Navem ill' adtunc & ibidem præparavit & aptavit pro quodam Voiagio mercatorio a portu de London ad Insulam de Maderas & separalia alia loco in partibus transmarin' cum eadem Nave fiend. ac adtunc & ibidem præparavit & aptavit pro quodam Voiagio mercatorio a portu de London ad Insulam de Maderas & separalia alia loco in partibus transmarin' cum eadem Nave fiend. ac adtunc & ibidem scilicet apud London' præd. in Paroch. & Ward. præd. diversa bona & catalla mercimon' & merchandisas ad valent' 10000 l. & amplius abinde in partibus transmarinis merchandizandi causa transportand. in eadem Nave oneravit pro salario commodo & proficuo ipsius T. Sands inde fiend. ac cum eadem Nave post finem voiagii illius in Angliam redeund' Gubernator ramen & Societas Mercator' de London' ad Indos Orientales negotian' necnon Thomas Exton Miles Samuel Franklin Armig' Willielmus Joyner and Johannes Leech præmissorum non ignari sed machinan' ipsum Thomam Sands contra debitam legis terræ hujus Regni Angliæ formam & effectum Statutorum in hujusmodi casu super edit. & provis. indebite prægravare opprimere & fatigare & prohibere & retardr Navem prædict. a Voiagio suo prædict. prosequend. Ac ipsum Thomam Sands de proficuo & advantagio Voiagii illius impedire

impedire & deprivare necnon dictum Dominum Regem & Coronam suam Regiam exhæreditare cognitionemque placiti * prædicti quæ ad dictum Dominum Regem nunc & * P. 494.
Coronam suam Regiam specialit. spectat & pertinet ad aliud examen in Cur. Admiralitat. trahere ipsi iidem Gubernator & Societas prædict. & Tho. Exton Sam' Franklin Willielmus Joyner & Leech postea scilicet 13 Decemb. anno Regni dicti D'ni Regis tricesimo quarto apud Paroch. beatæ Mariæ de Arcub. in Ward de Cheap London. causaver. & procuraver. ipsum præd. T. Sands & Navem præd. sectari & prosequi in alta Cur. Admiralitas Angliæ Judicis tent. de eo quod ipse idem Th. Sands cum Nave præd. fuit designat. in quodam Voiagio & navigare intendebat in partes transmarinas viz. ad Indos Orientales ibidem merchandizare & mercaturam exercend. quibusdam locis portubus Regionibus & Dominiis in quibus sola merchandizatio & negotiatio, Anglic *Trading*, per Literas Patentes Domini Regis nunc sub magno sigillo suo Angliæ præd. Gubernator. ac Societat. concess. fuit prout in Cur. Admiralitatis præd. allegat. & pretens. fuit Ac superinde & sup' allegation. & pretension. ill. in Cur. ill. fact. pretext. cujusdam Warranti e præd. suprema Cur. Admiralitatis Angliæ emanan. ipsi iidem Gubernator & Societas Tho. Exton Samuel Franklin Willielmus Joyner & Leech die & anno ult. præd. Navem præd. ceper. & arrestaver. & capi & arrestari causaver. & procuraver. super terr. & infra corpus Com. scilicet apud London. in Parochia & Ward. præd. Ac eandem Navem cum eisdem bonis & catallis in eadem adtunc & adhuc ibidem oner. ut præfertur sub arresto præd. ex causa præd. continue abinde hucusque detinuer. & adhuc detinent ipsumque Tho. Sands in præd. Cur. Admiralitatis Angliæ coram præd. Richardo Lloyd Mil. Legum Doctore Surrogato Leolini Jenkins Militis dictæ Cur. Admiralitatis Angliæ Judicis comparere de et super præmissis respondere minus juste astringere Ubi revera et de facto idem Th. Sands tempore caption. et arrestation. Navis præd. et diu antea fuit Magister ejusdem Navis et eadem Nave præparat. aptat. et onerat. fuit cum bonis et catallis præd. pro Voiagio præd. super terram infra Corpus Com. scilicet apud London. præd. in Paroch. et Ward. præd. et non infra Jurisdiction. Cur. Admiralitatis præd. Ac ubi revera et de facto pretens. causa pro caption. et arrestation. Navis præd. accrevit super terram et non super alto mari nec infra Jurisdiction' Cur' Admiralitatis scilicet apud London' præd. in Parochia et Ward. præd. Ac ubi revera prædict. Judex Cur. Admiralitatis nunquam habuit potestatem sive authoritatem tenend. placit. præd. nec audiend.

et

* P. 495. et terminand. * cauſam præd. Ac ubi revera et de facto præd. pretenſ. Literæ Patentes Domini Regis nunc fact. et conceſ. et ſigillat. fuer' ſuper terram, ſcilicet apud London præd. in Paroch. et Ward. præd. Ac licet idem Th. Sands omnia et ſingula præmiſſa præd. per ipſum ſuperius in hac parte ſuggeſt. et allegat. in prædict. Cur' Admiralitatis coram præfat. Judice Cur' illius in ipſius Th. Sands et Navis præd. exoneration. et diſmiſſion in præmiſſis in eadem Cur. Admiralitat. coram præfat. Judice ſæpius placitavit et allegavit et ill. teſtimonio et veritate inevitabili probare obtulit Idem tamen Judex Cur' Admiralitatis clamans et prætendens cognition. cauſæ et materiæ præd. ſibi de jure ſpectare et pertinere placitum allegation. et probabation. ill. admitterre ſeu recipere ac Navem præd. amittere et exonerare penitus recuſavit ac ad inſtance. et promotion. præd. Gubernator' et Societatis Tho. Exton Sam. Franklin Willielmus Joyner et Leech per quandam ſententiam ſuam in ea parte habit. et fact. decrev' et ordinav' quod navis præd. continuaret ſub arreſto præd. quouſque cautio al. ball. ad valenc. 40000 l. imponeretur pro nave præd. in præd. Cur. Admiralitatis quod navis præd. non procederet nec mercatur. exerceret ad aliquem locum Regionem ſeu Ditionem infra limites per prædictas Literas Patentes eiſdem Gubernator. et Societat. conceſſ. contra formam earundem Literarum Paten. in dicti Domini Regis nunc et legum ſuarum contemptum et in retardation. Voiagii præd. & ipſius Th. Sands ad grave præjudiciu. et depauperation. manifeſt. ac contra formam et effectum Statut. in hujuſmodi caſu edit. et proviſ. Et hoc parat. eſt verificare unde idem Th. Sands auxilium Cur. dicti Domini Regis nunc hic humillime implorando petit ſibi remedium feſtinum et breve dict. Domini Regis nunc hic de prohibitione præfat. Judici Cur. Admiralitatis ac al. Judici in hac parte compet. cuicunque Ac etiam præd. Gubernator. et Societati Mercatorum London. ad Indos Orientales negotian. procuratoribus factoribus et agentibus ſui quibuſcunque Necnon præd. Tho. Exton Sam. Francklin Will Joyner Leech et omnibus aliis Officiariis et Miniſtris ejuſdem Cur. Admiralitatis in hac parte dirigend ad perhibend ipſis & eorum cuilibet ne ipſi vel eorum quilibet placitum præd. præmiſſa præd. quoviſmodo tangen, coram ipſis vel eorum aliquo ulterius teneant nec eorum aliquis teneat Et ne præd. Gubernator et Societas Factores Procuratores et Agentes ſui necnon præd. Th. Exton Sam Francklin Willielmus Joyner & Leech quoviſmodo in placito præd. premiſſa præd. quoviſmodo concernen. verſus ipſum Tho. Sands vel navem

navem præd. in præd. Cur. Admiralitatis ulterius procedant necnon eorum aliquis procedat * quod in ipſius Th. Sands præjudicium vel navis præd. in Voiagio præd. retardation. vel læſion. Coron. dicti Domini Regis procedere valeat quoviſmodo Et ſi quicquam in contrarium præmiſſor' fact. ſit illi eidem Th. Sands emendari facerent nec quicquam in negotio præd. verſus ipſum Th. Sands vel navem præd. ejuſve apparat. ſive acceſſion. attemptet ſeu attemptent ſed quod omnia decreta ſeu ſententiæ ſi quæ verſus ipſum Th. Sands ſeu navem præd. ſeu bona in eadem exiſten. de et ſuper præmiſſis occaſione præmiſſorum fulminaverit ſeu pronunciaverit ſine dilatione relevari adnullari et fruſtrari cauſaret ſeu cauſarent et ipſum Th. Sands et navem præd. cum eiſdem bonis et catallis ab arreſto et reſtriction. præd. relaxaret et penitus abſolveret Ita quod idem Th. Sands in Voiagio illo procedere valeat ſi voluerit Et ei concedit. &c. * P. 496.

Memorandum, on *Thurſday April* 20, 1683. 35 *Car.* 2. Sir *William Dolben* one of the juſtices of *B. R.* received a *ſuperſedeas* to his commiſſion of being judge of this court. And *April* 25. 1683. being the firſt day of *Eaſter* term Sir *Francis Withens* knight, council extraordinary to the king, and of the *Middle Temple* was ſworn ſerjeant at law, and in the afternoon at the lord keeper's houſe ſworn one of the juſtices of *B. R.* He gave rings, *Cujus Inſcriptio*, *Lex placuit Regi*.

The enſuing caſe and argument I had from the lord chief juſtice *North*, *May* 25. 1681.

Carter *verſus* Crawley. *In Prohibition.*

Diſtribution.

ROBERT HAMOND died inteſtate leaving neither wife nor child, father nor mother, brother nor ſiſter, nor uncle. The adminiſtration was granted to *Agnes*, the plaintiff's wife, the ſurviving ſiſter of the inteſtate's father. The defendants are the children of *Margaret* the other ſiſter of the inteſtate's father, who ſue in the Spiritual Court to have a proportion upon diſtribution according to the late act of 22 & 23 *Car.* 2 *cap.* 20. for ſettling of inteſtates eſtates, and the judge did award diſtribution; whereupon they prayed a prohibition. And the defendants appearing to an attachment upon the prohibition, and denying the contempt, ſet

set forth this matter in a plea to have a consultation; whereupon the plaintiff demurs.

* P. 497. * The question is single, the intestate having neither wife nor child, nor father nor mother, but his next of kin being two aunts, one whereof was dead in his life-time, and the other having administration, whether the children of the deceased aunt shall be admitted *Jure repræsentationis in loco parentis* to demand a share upon distribution, as their mother should have had if living.

It depends upon the exposition of the act for settling intestates estates, and is of great consequence; for whatever is determined by the common law to be the true meaning of this act must be a rule to the ecclesiastical courts, for the courts of common law are entrusted with the exposition of acts of parliament, and we ought not to suffer them to proceed in any other manner than shall be adjudged by the king's courts to be the true meaning of this act; therefore if this court shall award a consultation upon this point, it is final, and this sentence cannot be corrected by any appeal.

Because the ecclesiastical courts did before this statute exercise a kind of jurisdiction of distribution, of which notice is taken by the act, as if it were legal; whereas by our law no such jurisdiction was allowed, but prohibitions were sent to restrain them therein, and this act intended to restore this jurisdiction.

It will not be amiss to take a short view of the history of their practice.

Ecclesiastical courts anciently grasped at a large jurisdiction *De Debitis & Catallis* upon pretence of taking cautionary oaths to perform contracts and such like, and then upon breach thereof did proceed *Pro læsioni Fidei*; but by statutes and mandatory writs they were contained within their due bounds not to meddle *De Debitis & catallis* (which were temporal things) *nisi de Testamentis & Matrimonio.*

In the jurisdiction *de Testamentis & de Debitis & Catallis* relating to them, their power was very large by the common law; for if there were no will appearing, the ordinary had the absolute disposal of the estate.

If they would not pay debts with the estate, yet they were so far intrusted that they were not subject to suit until 13 *E.* 1. *Westm.* 2. *c.* 19. which subjected them to the suit of the creditors in the same manner as executors were.

Upon this their meddling with deceaseds estates, which was very beneficial before, became very troublesome, and to free themselves from it they were fain to put the administration

tration * thereof into third perſons hands, who might give them ſecurity to ſave them harmleſs from ſuits. * P. 498.

17 *E.* 3. When it was deſired in parliament, that adminiſtrators might have the power to ſue, it was anſwered, that the ordinaries might ſue ſith they were to anſwer; whereby it appears that parliament would not diſcharge them of the burthen, or take notice of adminiſtrators otherwiſe than as their ſervants or attornies:

But 13 *E.* 3. eaſed them in this particular, for they being thereby bound to grant adminiſtration to the beſt friend of the inteſtate, and the adminiſtrators being made as executors, they retained only the baſe juriſdiction of granting adminiſtration and calling the adminiſtrators to account.

The common law was hereupon to judge who were the beſt friends, and therefore if there were huſband or wife, in default of them, ſon or daughter, in default of them or their children, father or mother, in default of them, brothers or ſiſters, in default of them or their children, uncles or aunts, the ordinary was compellable to grant adminiſtration to them in their ſeveral orders.

They were bound to grant to the next friends, if they were loyal, but if they were many in equal degree, perhaps they were not bound to grant adminiſtration to all, but might chooſe the moſt fit perſon for avoiding confuſion.

22 *H.* 8. This was made plain, for thereby they had a liberty expreſsly provided to refuſe the wife, if they pleaſed; and if they were many in equal degree of the next of kindred, to grant adminiſtration to which they pleaſe, and refuſe the reſt, which liberty was a great advantage to their juriſdiction.

For they would chooſe him that was moſt obſequious to them, and when they called to account upon pretence of beſtowing the overplus for the good of the deceaſed's ſoul (a device in thoſe popiſh times to make profit to the clergy) they diſpoſed the overplus as their own.

Upon the reformation that pretence vaniſhed, but they thought it allowable to diſtribute the overplus amongſt the kindred, according to the rules of the civil law, *de Succeſſoribus ab Inteſtato.* And this was ſo reaſonable, that they uſed that courſe without blame a great while, and inſerted a clauſe into all their bonds for ſecurity to account to the ordinary, that the overplus upon ſuch account ſhould be diſtributed as the ordinary ſhould appoint.

Which was more than they could juſtify, and it came to be queſtioned in *Slany*'s caſe, *Hob.* 83. and *Moor* 864. but ended

P. 499. ended * by reference, and afterwards in *Took* and *Lawne*'s caſe, *Hob.* 191. The adminiſtrators were willing to make a reaſonable diſtribution; but their adverſaries not being ſatisfied, appealed to the delegates, which unreaſonable oppoſition drove the adminiſtrators to the king's courts, where it was reſolved that he was not compellable to make any diſtribution at all; and accordingly it was reſolved in *Fotherby*'s caſe, 2 *Car.* 1. 1 *Cr.* 62. and *Levanus*'s caſe, 6 *Car.* 1. 1 *Cro.* 201. whereby the law came to be ſettled and known, that they could neither compel adminiſtrators to make diſtribution by ſuit in the ſpiritual court, nor ſue any bonds taken for that purpoſe.

The only way then left for them was this, whilſt they were under deliberation whether they would grant adminiſtration to the wife or next of kin, and to which of the next of kin, they did treat with the parties, and conſider what ſum the overplus was like to amount unto, how that ought by their rules to be diſtributed, and they would prefer him to the adminiſtration that would beforehand perform ſuch diſtribution by payment of monies, and giving ſecurity to perſons unto whom it was appointed; and this practice held till the making of this act whereon the queſtion ariſes.

The occaſion of making this act was, becauſe it was found very inconvenient for any adminiſtrator to pay before he received; it was hard for him to know what he might undertake before he had poſſeſſion, and the judge could not have a perfect knowledge of the true value of the overplus to give him in the meaſure of his diſtribution till after the adminiſtration ended, and the account of the eſtate taken.

There were public inconveniencies, which were urged to the parliament by the civilians, who yet had another reaſon to deſire the former methods might be changed; for the allotting diſtributions in this manner was but a barren juriſdiction that could not be drawn out in length; all diſputes were ended *uno flatu* without appeal, and the accounts of adminiſtrators were never conteſted when there was no adverſary concerned to demand a ſhare in the overplus upon taking them.

Having ſaid thus much concerning their practice before the act of parliament, and the cauſes of making this law, I will now proceed to the expoſition of it.

The ſtatute is *Introductivum novi juris*, and therefore ought to receive a ſtrict interpretation in reſtraint of diſtributions, which are hereby introduced againſt the policy of former laws.

Before

Before the ſtatute the adminiſtrator that had all the burthen of the adminiſtration had likewiſe the benefit, and when he had paid all the debts and legacies, was never more queſtioned upon his account, becauſe no man could demand the overplus from him; but now by this law the overplus is given away, and he is to have no part of it, but as he ſtands related to the inteſtate, no recompence for his pains, no more than he ſhould have had if another had been adminiſtrator. And here is not only *Lucrum ceſſans*, but *Damnum emergens*, for at the end of his adminiſtration he muſt give an account, which will be diſputed by the parties concerned, and if he hath not acted very cautiouſly may bring a conſiderable loſs upon him. * P. 500.

Methinks we ſhould expound this act as much in favour of adminiſtrators as we can in reſtraint of diſtributions and remote repreſentatives, that are brought to participate of the benefit of the adminiſtrators thrift and good management.

But I admit that all acts of parliament are to be expounded according to the true meaning to be collected from the words of them, and that muſt be a rule in this caſe; therefore I will endeavour to find out that meaning, 1. By conſidering the reaſon of diſtribution, and the practice in the eccleſiaſtical court grounded upon that reaſon, as it was before this ſtatute. 2. By conſidering the words of the act relating to this clauſe.

As to the rules of ſpiritual courts in ordering diſtribution, I ſhould have been glad the parties would have brought civilians to have informed us concerning the grounds of their law and practice in this particular.

Not having had that aſſiſtance, I have conſidered in the beſt manner I can upon the nature of the thing, whereupon I apprehend there are two motives of diſtribution, one in reſpect of the inteſtate, another in reſpect of the ordinary that grants adminiſtration.

In reſpect of the inteſtate it may be thought an obligation upon every man to provide for thoſe which deſcend from his loins; and as the adminiſtrator is to diſcharge all other debts; ſo this debt to nature ſhould likewiſe exact a diſtribution, to all that deſcend from him in the lineal degrees, be they never ſo remote.

And becauſe thoſe which are remote have not ſo much of his blood, therefore the meaſure ſhould be according to the ſtocks, more or leſs as they ſtand in relation to him.

Upon this reaſon repreſentations are admitted to all degrees in the lineal deſcent.

There

* P. 501. * There is no ſuch obligation to the remote kindred in a collateral line, therefore they are not regarded but in reſpect of proximity as they are next of kin, it being to be ſuppoſed, every man would leave his eſtate to his next kindred; but the children of thoſe that are deceaſed come not within this reaſon, for they are a degree more remote.

In reſpect of the ordinary it may be conſidered that thoſe that are of equal degree and next of kin, be they never ſo many, ought to be looked upon by the ordinary with an equal eye, therefore when he has preferred one to the adminiſtration, he ought to give ſome recompence to the others, that he may not appear partial, they being as capable to demand and have adminiſtration as the other. But the children of thoſe which are deceaſed have not the ſame pretence; for they were not capable to conteſt the adminiſtration.

Another reaſon there is to exclude repreſentations in remote degrees, that thereby the eſtate might come to be divided into ſo many and ſo ſmall parts that the benefit would not be valuable.

I have heard civilians ſay, that repreſentations are rejected in remote degrees of collaterals by their law upon this ground.

Now the caſe of brothers children is of a mixed conſideration, 1. In reſpect of the obligation, for the inteſtate was a kind of parent to his brothers children, and in that reſpect marriages between them are prohibited. 2. There is no danger that the ſubdiviſions ſhould be very many and the eſtate reduced into very ſmall parts; for brothers and ſiſters cannot be many, as couſin germans and other remote degrees may, therefore there may be reaſon to admit brothers children to diſtribution by repreſentation, and reject all farther degrees.

Having touched the reaſons whereupon I ſuppoſe diſtribution grounded, concerning the practice, I can only ſay what I have learnt by enquiry from civilians of my acquaintance, having had no other means to be informed of it, the bar not having produced any precedents of the ſpiritual courts on either ſide.

In the caſe at bar the order of the ſpiritual court is for a diſtribution to the brothers children of the collaterals, who are not the inteſtates brothers children; and by that it ſhould ſeem as if their law (if we ſhould let them alone) would carry on the diſtribution by repreſentations to a more remote degree.

But

* But I have been informed by eminent civilians of my acquaintance, I ſuppoſe I may name them without their diſpleaſure, ſir *Leoline Jenkins*, judge of the prerogative court, and ſir *Robert Wiſeman* dean of the arches, that it is the conſtant and clear practice of their court to reject all repreſentations of collaterals, except children of the inteſtate's brothers and ſiſters. * P. 502.

I am ſorry the plaintiff in this prohibition did not ſeek redreſs by way of appeal, that we might have ſeen what would have been finally ordered in their law, by which we might have known how their law ſtood, as to this point, which might have given us ſome light towards the underſtanding this act.

I muſt confeſs that I do acquieſce in the opinion of thoſe learned men, and take their law to ſtand in this point for the excluſion of all repreſentations to remote collaterals. I give little credit to the ſentence in this cauſe: I remember the ſame judge, the archdeacon of *Huntington*, the other day ordered diſtribution amongſt the kindred of the firſt inteſtate upon an adminiſtration *cum Teſtamento annexo*, where the *reſiduum bonorum* was deviſed to the executor, who died inteſtate, whoſe next of kin ought clearly to have had it, which occaſioned our granting a prohibition upon ſight of the ſentence. This being the ſame judge, I have the leſs reverence for his opinion in the other matter.

I will now conſider the words of the act of parliament, whereupon this queſtion ariſeth, they are theſe,

[*The reſidue of the ſaid eſtate to be diſtributed equally to every of the next of kindred of the inteſtate, who are in equal degree, and thoſe who legally repreſent them.*

Provided that there be no repreſentations admitted amongſt collaterals after brothers and ſiſters children.]

Upon theſe words, the queſtion is thus, Whether in the collateral line only the inteſtate's brothers and ſiſters children can be admitted to have diſtribution *Jure repræſentationis in loco parentis*, or whether repreſentations are admitted in remoter degrees of collaterals to the children, of ſuch as were brothers and ſiſters to the collaterals.

In ſhort, whether the words *brother* and *ſiſter* ſhall relate to the inteſtate, or to the collaterals.

I hold, that the words of the act muſt be underſtood of brothers and ſiſters to the inteſtate, and not of brothers and ſiſters of remoter collaterals; for theſe reaſons:

* 1. All other relative terms generally expreſſed through the whole act have the inteſtate for their correlative, ſo *(wife)* is meant wife of the inteſtate, *(children)* are chil- * P. 503.

dren of the inteſtate, *(heir at law)* is of the inteſtate; ſo that in the moſt plain and obvious ſenſe, the inteſtate ought here to be taken for the correlative to the words brothers and ſiſters.

2. My ſecond reaſon is, Becauſe the diſtribution is given by the act for their relation to the inteſtate, and not for their relation to the collaterals, therefore the relation mentioned ought naturally to refer to the inteſtate, and not to the collaterals. There may be caſes put wherein brothers and ſiſters children of collaterals may be no kin to the inteſtate, if they were by the half blood, and it cannot be pretended that ſuch ſhall have a ſhare in the diſtribution. Now why ſhould the words be taken in the ſenſe that comprehends thoſe that have no title to diſtribution?

3. My third reaſon is, Becauſe as theſe words comprehend more than ought to have diſtribution in ſome inſtances, ſo they fall ſhort and leave out many that by parity of reaſon ought to have diſtribution, and therefore this ſenſe they would put upon the words is very improper.

As for inſtance.

Suppoſe the next of kin are nephews by ſeveral brothers, and ſome of them are dead, leaving children, theſe children are not brothers children to the collaterals, and cannot within the words claim any ſhare; but if by chance any of them had had uncles ſurviving, then they had been brothers children to the collaterals.

So if the next of kin are couſin-germans, and ſome of them are brothers to one another, others are not; the children of ſuch of them as had brothers that ſurvived the teſtator ſhall have a ſhare, but the children of ſuch who had no ſurviving brothers ſhall have no ſhare, which is moſt abſurd, for they ought to have a ſhare as they relate to the inteſtate, and not as they relate to the collaterals.

I muſt needs ſay it is hard to imagine the parliament could overſee theſe abſurdities which are ſo plain in conſequence, and they had been ſo eaſily avoided, that we ought for that reaſon to believe, that they meant the relation to the inteſtates in this as well as other places.

If they had meant the relation ſhould have been to the collaterals, how eaſily might it have been expreſſed ſo, and by words that would have brought in all caſes in parity of
* P. 504. * degree, as if it had been thus expreſſed *(Provided that there be no repreſentations admitted amongſt collaterals after their children)*

This had been without ambiguity or queſtion, and it had extended

extended to all caſes *in pari gradu*, and to no caſe but where there was kindered to the inteſtate.

I cannot imagine the parliament meant to let in repreſentations in remote degrees, becauſe they might ſo eaſily have expreſſed it in plain terms, and they would certainly have done it in this act, which is carefully penned in other parts of it.

4. A fourth reaſon is, Becauſe the excluding repreſentations in a remote degree agrees with the reaſons upon which diſtribution is grounded. For, 1. Nephews and nieces to the inteſtate are of ſo near relation, the inteſtate having been as a parent to them, that they are of great regard, whereas remoter degrees have no regard but for their proximity (becauſe there are none nearer) and therefore no reaſon to admit repreſentations amongſt them, to bring in a remote degree to ſhare with thoſe that are nearer of kin. 2. Again, Nephews and nieces cannot be many, ſo that the diviſion cannot come into very many parcels; but in a remote degree there may be very many of the ſame degree, and to admit a ſubdiviſion to the children of any deceaſed would make the ſhares of ſuch children very inconſiderable, not worth demanding.

5. My fifth reaſon is, Becauſe by the opinion of the learned, the law and practice of the ſpiritual courts before this act did exclude all repreſentations of collaterals, after the inteſtates nephews and nieces.

The whole ſcope of the act was to make their juriſdiction as to diſtribution legal, which before was condemned by the king's courts, and the words of the act *(legally repreſenting) (pro ſuo cuiq; jure)* and (according to the laws in ſuch caſes) and (the rules and limitations ſet down) ſhew that there is a reference to their laws. Now if there were an opinion this way before the act; there is great reaſon to believe this clauſe was founded upon that opinion, and to expound it that way. I never heard of any opinion that before the act the repreſentations were bounded to brothers children of collaterals. It may be the learned Doctor who hath ordered diſtribution in this caſe, has done it upon an imagination, that this clauſe has changed their law in this particular, taking it in that ſenſe that my brothers do that have argued againſt me.

* I ſhall now obſerve the objections that are made a- a P. 505.
gainſt me.

1. *Object.* They ſay, *Ad proximum antecedens fiat relatio*, and the next precedent relative is the word *Collaterals*.

Sol. This maxim hath always this reſtraint, that it muſt

agree with the ſenſe, ſo that it admits an enquiry which relative beſt agrees with the ſenſe, and we muſt judge according to the ſenſe, and not by the order of words.

2. *Object.* They ſay it is ſtrange this *Proviſo* ſhould reſtrain repreſentations of collaterals to one particular caſe, which were left under a generality before.

Sol. I ſee no cauſe of wonder, if it were ſo; but that which is called a generality, is by the words *(legal repreſentatives)* and if by the courſe of their law repreſentations were not admitted to other collaterals than brothers and ſiſters children, then thoſe remoter degrees had no legal repreſentations; ſo that this clauſe is but explanatory of the word *(legal)* in the ſenſe of their law, our law having no notice of it at all.

3. *Object.* They ſay there is no inconvenience in the other expoſition, but it ſeems reaſonable that the nephews in all caſes ſhould have a ſhare with the uncles.

Sol. I have already ſhewn by my reaſons, that by the other expoſition the ſymmetry and reaſon upon which diſtribution is grounded fails, and many abſurd caſes will follow upon it.

4. *Object.* Then they object that there are few acts of parliament that provide for all caſes; there are *Caſus omiſſi* upon the moſt clear laws, and the ſenſe of an act muſt not for that be loſt.

Sol. I confeſs a law clearly penned ſhall have its force in caſes it does reach, though it does not reach all caſes; but where a law is penned, that it may be expounded one way or other, and there is a queſtion of the meaning of it, it is more natural to believe it was meant in that way that is clear, and that reaches all caſes that are in parity of reaſon, than in that way that has abſurd conſequences, as this hath, both by including thoſe which were not intended, and leaving out thoſe which ſtand in the ſame degree, as I ſhewed before.

To conclude, I conceive this act was intended for a plain rule, and I think it much better to interpret it in the moſt plain and obvious ſenſe which will eſtabliſh the ſucceſſion of perſonal eſtates, according to reaſon and ſymmetry, than to ſtrain to find out another ſenſe for the ſake of remote kindred, that are of no regard, which will produce apparent abſurdities, * and ſubject perſonal eſtates to fanciful and intricate diſputes, that will need another act to compoſe and ſettle.

* P. 506.

Having

Having desired the opinion of the learned Doctors of *Doctors-Commons* upon the question following,

Whether before the late statute of 22 *Car.* 2. for settling intestates estates upon ordering distributions, representations were admitted amongst collaterals in remote degrees? or, Whether there were any bounds set by their law or practice beyond which representations were rejected, and what those bounds were? or, Whether it was not merely discretionary as the ordinary thought fit? I received this answer from them:

In making distributions of intestates estates amongst collaterals, our civil law, and the practice of the ecclesiastical courts have constantly observed these two rules.

The first is, *Repræsentatio in filius fratrum & sororum tantum locum habet, ad ulteriores vero Collaterales non extenditur.*

The second is, That in case there be no brothers nor brothers children, *vocantur ad successionem reliqui Collaterales quicunq; in gradu sunt proximiores, remotioribus exclusis. Ita quod infallibiliter semper prior in gradu sit potior in successione*, whereby representation must needs be out of doors, the next of kin, whether one or more being only to be admitted to the distribution.

10 May 1681.

Robert Wiseman,
Thomas Exton,
Richard Lloyd,
Edward Master,
William Trumbal.

A TABLE

TABLE

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tiff refuſed it; and that the ſon was always ſince, and yet is ready to pay the ſame; the plaintiff demurs. For although as was alledged, of ancient time the pleading an accord without execution of the whole, was not good, according to the reſolution in *Peyto*'s caſe, yet of late it hath been held, that on mutual promiſes an action lies, and conſequently there being equal remedies, an accord may be pleaded without execution; which was agreed by the court, *Page* 450

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The father ſhall not have an action for the loſs of the marriage of his ſon and heir, except when a ſtranger takes him by force and marries him; but if the ſon marry himſelf, or a ſtranger procures him to marry one, the father hath no remedy, 259, 260

The father cannot maintain an action for the aſſault of his daughter, but only by reaſon of the loſs of her ſervice; *Per Raymond* baron, 260

In a ſpecial action of the caſe the plaintiff declares, that he is a hackney coachman, and that the defendant, with an intent to diſgrace him, did ride ſkimmington, and deſcribes how, thereby ſurmiſing that the plaintiff's wife had beat the plaintiff, and by reaſon thereof perſons who formerly uſed him, refuſed to come into his coach to be carried by him *ad damnum*; after verdict for the plaintiff, judgment was given, *quod querens nil capiat per Billam*, 401.

In

In an action of the case for not grinding at his mill; where one prescribes for multure, he ought to aver that his mill is sufficient to grind all the corn, *Page* 327

An action of the case lies for maliciously prosecuting the plaintiff in the ecclesiastical court, for not making his account as churchwarden of the parish of *D.* the defendant knowing that the plaintiff had made his account before, which was approved of by the parish, 418

Every man shall recover according to the right he hath at the time of the bringing the action only, 463

And therefore if the heir brings an ejectment, and his ancestor dies subsequent to his action, he shall not recover, *ibid.*

ACTION for *WORDS.*

The defendant being seised of lands said of the plaintiff, *he had forged a deed to cheat him of his land, and he gave* A. B. 40*s. for ingrossing it*, an action lies, 4

I will indict Richard Rawlins *at the next sessions, and he shall lose his estate, and it shall go hard with him for his life, but his estate he shall surely lose for marking my sheep*, not actionable, 12

Nuttal *that was* Solomon Smith's *clerk is a knave and a rogue, and I will prove it, and he is in* Newgate, *and is to be hanged for counterfeiting the king's hand and seal*, adjudged actionable, 17

He is a base fellow, and I will question him ere long, for that he would have taken away the king's life; it seemed to the court that the words were actionable, because in the case of the king the intent is punishable *Page* 20

Thou art a traitor and a rebel, 23

Thou hast stolen our bees (innuendo *a stock of bees*) *they are hidden under the old woman's hempseck, and thou art a thief*; after verdict judgment for the plaintiff, 33

Thou art a thief and hast stolen my trees, actionable; for it shall be intended such trees whereof theft may be committed, *ibid.*

Dacy *is a witch, and deserves better to be hanged than old* Arthur, *who was hanged for a witch*, adjudged actionable, 35

Orton says, *I am a perjured knave, but he is a perjured knave as well as I, for he and* Field *swore for one another*, actionable, 51

If words are actionable at first, the damages after doth not give cause of action, and therefore the statute of limitations of two years is a good bar in that case, 61

But where the words at the time of the speaking are not actionable, but by reason of them the party after loses his preferment, in that case the statute of limitations of two years is not any bar, *ibid.*

To call a tradesman *a cheat*, an action will lie if he speaks of his profession, but to speak it generally it will not, 62

You are a whore, &c. *per quod* she has lost her marriage; on verdict and judgment for the plaintiff in the *Marshalsea*, assigned for error, that it doth not appear that the cause of action, *viz.* that the loss of the marriage was within the jurisdiction of the court, and the other words are not actionable, and judgment reversed, 63

The plaintiff declares that he is and hath

hath been, and was ſuch a day the maſter of a bark; the defendant ſaid to him, *thou art a cheating knave and a cheating rogue, and thou haſt cheated my ſon-in-law*, John Bradley, *of a cable rope which belongs to the bark*, if actionable, *quære*. *Page* 75

An action brought by a reeder for theſe words, *you cheated Mr.* Rawley *of a pannel of reed*, not actionable, 75

The plaintiff brings an action in *London* for theſe words, *thou art a whore and my huſband's whore*, and the defendant removes it by *Habeas Corpus* into this court, and a *Procedendo* was granted by three juſtices, *Hide* chief juſtice diſſenting, 81

The plaintiff counts that he is a lime-burner, and gets his living by buying and ſelling thereof, and that the defendant ſaid of the plaintiff *in arte ſua, that* John Terry *is a run-away, and is a baſe cheating rogue, and* John Terry *ſhall never think to bring* John Webb *where he is himſelf, and rather than ſo I will ſpend* 20l. The court was divided touching theſe words, and no judgment given, 87

In ancient time it was the conſtant courſe in declarations for words, to lay a *Colloquium*, and it was a grand doubt if it was good without it, until *Smith* and *Ward's* caſe in *Cro. Jac.* and there reſolved *de Querente* ſupplies the *Colloquium*, *ibid.*

Thou art a baud, and I will prove you a baud, and you took 5 s. *for a clean pair of ſheets for two whores and two rogues*; it ſeemed to the court the words are actionable, *Page* 115

The plaintiff declares he is a mercer, and that the defendant ſaid to him theſe words, *thou art a cheating knave and a rogue*, not actionable, 169

The defendant ſaid of the plaintiff being a merchant, and maintained himſelf and his family by buying and ſelling, Auſten Drake *is broke and gone to* Virginia, *I have ill fortune, for* Auſten Drake *is failed, and I have loſt my monies*; Auſten Drake *is a beggarly fellow, and not worth a groat, and not able to pay his debts, and rides abroad with his man double armed for fear of bailiffs*, held actionable, 184

The plaintiff declares, that he is an attorney of *C. B.* and that the defendant and he had diſcourſe of the plaintiff, and of his profeſſion, and that the defendant ſaid to the plaintiff *in auditu quamplurimorum, thou canſt not read a declaration*, actionable, 196

The plaintiff declares, that he was at the time of the words ſpoken, and yet is a merchant, and that there being communication of him, the defendant ſpake theſe words of him, *I believe all is not well with* Daniel Vivian, *there are many merchants that have lately failed, and I expect no otherwiſe of* Daniel Vivian; adjudged for the plaintiff, 207

The plaintiff declares, that he is a keeper of livery ſtables, and an Inn at the *Bellſavage*; and the defendant had other ſtables for the ſaid purpoſe, in the ſame yard; a ſtranger comes with a waggon into the ſame yard, and demands of the defendant which

is *Bellſavage-Inn*; the defendant replies, this is *Bellſavage-Inn*, deal not with the plaintiff for he is broke, and there is neither entertainment for man nor horſe; after verdict for the plaintiff, judgment was given for the plaintiff after much debate, *Page* 231

The plaintiff declares, he being a clergyman, the defendant ſaid of him theſe words, *viz.* Francis Wall *is a thief, and he ſtole plate from* Maudlin College *in* Oxford, *and I bought plate of one in* Oxford, *and gave it to the college for that plate; and thereby ſaved him from being hanged, ad damnum* 500 l. The defendant pleads in bar by attorney, that *ante diem* 1 *July* 12 *Car.* 2. the plaintiff married the defendant, and the plaintiff demurred; and adjudged for the defendant though pleaded in bar, 395

The plaintiff declares he was ſuch a day deputy lieutenant for the county of *Middleſex*, and one of the king's privy council for the realm of *Ireland*, and ſtood to be choſen burgeſs for the parliament at *Chriſt-Church*, and that the defendant ſpake theſe words of him, *(viz.) he is a Papiſt*; and adjudged the words were actionable, and judgment affirmed on a writ of error brought thereupon, 482, 483

The ſenſe of words alter as the times alter, for though formerly *(Papiſt)* was not actionable, yet now it is grown a word of reproach; ſo to ſay of an attorney he is a *knave* anciently was not, but now it is actionable, 482, 483

ADJOURNMENT.

All adjournments of the ſeſſions are in the preter-tenſe, and ſo of indictments, *Pages* 115, 116

ADMINISTRATION.

It's in the power of the ordinary to commit adminiſtration to the wife or next of kin; but when he hath committed it to one he cannot repeal it, and commit it to another, 93

The father is next of blood to his child to whom adminiſtration ſhall be committed, *ibid.*

Adminiſtration is committed to *J. S.* who grants the goods of the inteſtate, and after ſuit is in the court chriſtian by citation to repeal this adminiſtration, it's there confirmed, and after an appeal is brought of that ſentence, and the ſentence and alſo the adminiſtration is reverſed; yet adjudged notwithſtanding, that the grant of *J. S.* is good, 224

A man dies inteſtate, having neither wife nor child, nor father nor mother; but his next of kin being two aunts, one whereof was dead in his life-time, and the other having adminiſtration, the queſtion was, whether the children of the deceaſed aunt ſhall be admitted *Jure repræſentationis in loco parentis* to demand a ſhare upon the act of diſtributions, as their mother ſhould have had if ſhe had been living? 496, 497, 498, &c.

It ſeems an adminiſtratrix *durante minore ætate* as ſhe may ſell goods for payment of debts, ſo ſhe may retain

retain to pay herſelf, by *Raymond* juſtice, for that ſhe cannot pay herſelf, therefore the payment muſt be by way of retainer, *Pages* 483, 484

ADMIRALTY, vide *PROHIBITION.*

Prohibition lies to the admiralty upon a ſuit there for mariner's wages, 3

A ſentence in the admiralty of *France* is not examined at common law, but the courts there ought to give credit to it, 473

If any perſon finds himſelf aggrieved by ſuch ſentence, his way is to petition the king, who will examine the caſe, and if he finds cauſe of complaint, will ſend to his ambaſſador, reſiding with that prince or ſtate, and on failure of redreſs will grant letters of marque and repriſal, *ibid.*

AMENDMENT.

In debt upon an obligation againſt an executor, the defendant pleads it's not the deed of the teſtator; and found for the plaintiff, and judgment *quod defendens capiatur*, where it ought to be *in miſericordia*; and it was moved to have it amended; but ruled it cannot be amended in another term, 38, 39

But in the Common Pleas it may be amended, for there are dockets of every judgment; and if the entering of the judgment be defective in the roll, they uſe to mend it by the docket, *ibid.*

In ejectment by *John Wilde* againſt *Thomas Wheeler*, the judgment *quod præd.* Thomas *recuperet*, where it ought to have been *John*; and it was amended, *P.* 39

In an ejectment of ten acres of land, and five acres of paſture, and in the judgment the ten acres of land were omitted, and yet amended, *ibid.*

In debt upon the ſtatute of 2 *E.* 6. for tithes, and upon a nonſuit in the judgment *quod defendens eat ſine die* was omitted, and yet amended, *ibid.*

In an action of the caſe for words againſt huſband and wife, judgment was, that the huſband only ſhall be *in miſericordia*, and nothing ſaid of the wife, yet amended, *ibid.*

In an action on the caſe part is found for plaintiff, and part for the defendant; and as to that that is found for the defendant, the judgment is *quod querens & plegii ſui ſint in miſericordia*; and moved that the judgment ſhould be amended, & *plegii ſui* ſtruck out, becauſe they ought not to be amerced; but the court took time to conſider of it, 42

Error of judgment in the Common Pleas was aſſigned, that there were not any pledges; but it appearing on examination there was an original, an amendment was awarded, 51

Records have been frequently amended after error brought, 53

A record may be amended before a *recordatur* entered upon the roll, *ibid.*

The record of the *Niſi prius* roll varying in ſubſtance from the plea roll, a *Diſtringas de novo* was awarded, agreeing to the plea roll, 38

In

In covenant, the plaintiff counts that he demiſed to the defendant certain land for thirteen years, to pay to him quarterly 40*l.* and doth not ſay *annuatim*; the defendant pleads *Non eſt factum*; and found for the plaintiff, and after plea pleaded the plaintiff amended his declaration, and inſerted the word *annuatim*; and ruled the amendment to ſtand, *Page* 160

In debt on a bond, judgment was had by default by the plaintiff as executor, and the attorney had left out, *Et profert hic in Cur. literas teſtamentarias*; but the plaintiff was called executor in the declaration; and the defendant having brought error, it was moved to have the record amended, but denied, 223

After a record entered it's too late to have it amended, 64

ARBITREMENT.

Attachment denied to be granted for the breach of a rule of court had by conſent for the performance of an award, 35, 152

On no arbitrement pleaded the plaintiff replies, and ſets forth the award, which (amongſt others) conſiſted of two parts, 1*ſt*, That the defendant ſhould make a releaſe to the plaintiff until the time of the arbitrement, which, as was objected, diſcharged the bond of ſubmiſſion; but diſallowed, becauſe divers things are to be done together, and if all had been done the releaſe had been no prejudice. 2*dly*, The award was in part of ſatisfaction, which is not good but diſallowed, becauſe it's *tantum exiſten. partem redditus*, which is only a deſcription when he will pay it; and no diſcharge, *Page* 169

A ſubmiſſion to arbitrators and umpire at the ſame time without increaſing the time of the umpire, is void, 187, 205

ASSIGNMENT.

In debt for rent againſt the aſſignee of an executor of a leſſee for years, the defendant pleads an aſſignment by him to *J. S.* ſuch a day before any rent was arrear, and that he gave notice of it to the leſſor before any rent due; the plaintiff replies, that the aſſignment was to defraud him of his action by fraud and covin; the defendant demurs, and judgment was given for the plaintiff in *B. R.* and the defendant brought a writ of error, and after the parties agreed, 303, 304

Declaration in debt for rent-arrear, is good, without ſhewing mean aſſignments on demurrer, 389, 390

A covenant not to aſſign a thing in action to any perſon or perſons whatſoever. An aſſignment in equity is a breach of the covenant; for in law no aſſignment can be of a thing in action, therefore the intent of a covenant muſt be of ſuch an aſſignment as can be (that is) an aſſignment in equity, 459, 460, 461

ASSUMPSIT.

In conſideration that the plaintiff would give to the defendant 5*s.* the defendant would give to plaintiff

tiff 40*s.* if ever he played at a game called *Even* and *Odd* for money or wine, and avers he gave him 5*s.* and that the defendant played at the ſaid game ſuch a day, *unde actio accrevit*; held the action lies, *Page* 13

That whereas the huſband of the defendant, now dead, was indebted to the plaintiff, the defendant promiſed that if the plaintiff would make appear that her ſaid huſband was indebted, ſhe would pay it; a good *Aſſumpſit*, 32

A promiſe before breach may be diſcharged by parol, 42

On an *Indebitatus Aſſumpſit* for phyſick, *&c.* provided and delivered for the daughter of the defendant at his requeſt, after verdict for the plaintiff it ſhall be intended delivered to the defendant for his daughter, 67

If the father deſire one to find phyſic for his daughter, debt lies againſt the father, and conſequently an *Indebitatus Aſſumpſit*, *ib.*

The plaintiff declares that the defendant in conſideration of 10*l.* promiſed to let him enjoy certain iron mills for ſix months; and it appeared the ſaid mills were but worth 20*l.* *per annum*, and yet damages given for 500*l.* by reaſon of the loſs of ſtock laid in; and held the jury may well find ſuch damages, for they are not bound to give only the 10*l.* but alſo all the ſpecial damages, 77

The plaintiff counts, that whereas he had procured one *W.* at the requeſt of the defendant, to ſurrender a leaſe, that the defendant would pay, *&c.* without ſaying that the defendant aſſumed and promiſed to pay, *&c.* and judgment ſtayed on motion in arreſt of judgment for that cauſe, *Page* 123

Aſſumpſit by the heir to pay a debt due by his anceſtor upon an obligation, without declaring that the heir was bound thereby, *Quære* if good after verdict? 127

In conſideration the plaintiff would take an oath before one who had not power to adminiſter it, is a good conſideration to ground an *Aſſumpſit* on, 153

The plaintiff declares that he and the defendant were executors to *A.* and that the defendant did receive all the eſtate of the teſtator, whereas a moiety thereof did belong to the plaintiff, and that the plaintiff did threaten the defendant to ſue him to come to an account, and that the defendant in conſideration that the plaintiff did promiſe to forbear the ſaid ſuit, and to ſhew an account touching the eſtate of the teſtator; the defendant promiſed to pay to the plaintiff 100*l.* the plaintiff avers that he did forbear the ſaid ſuit, and did ſhew an account, and yet he hath not paid the 100*l.* Judgment for the plaintiff, 230

The plaintiff counts that one *Fenwick* was in arrear to him in 100*l.* for an annuity, and that the defendant was bailiff and receiver of his rents, who appointed the defendant to account with the plaintiff, and to pay all that ſhould be found in arrear to him, out of the next rents due at *Martinmas*, and that on account there was 100*l.* found due to the plaintiff,

tiff, and the defendant *adhuc exiſtens receptor* of the rents of the ſaid *Fenwick*, aſſumed to the plaintiff that if he would forbear the ſaid arrears for a month after *Martinmas*, he would pay the ſame, and avers he ſtaid till then, and the defendant had not paid him; on *Non Aſſumpſit* verdict and judgment for the plaintiff, *Page* 211

Aſſumpſit and *Trover* in one declaration ſeemeth not good, 233

In an *Aſſumpſit* the plaintiff declared, That whereas the plaintiff had at his own charges buried the defendant's child, the defendant promiſed to pay him his charges, and though there was no requeſt laid, yet judgment was given for the plaintiff, 260

An *Aſſumpſit* lies for him who is to have the advantage of a promiſe, although the promiſe was made to another, 302, 303

A promiſe to pay money to the attorney of *A.* the action may be brought by *A.* or his attorney, 303

Forbearance to ſue in chancery is a good conſideration to ground an *Aſſumpſit*, 372

In conſideration that the plaintiff at the ſpecial requeſt of the defendant, would endeavour and labour to perſuade *C. R.* to marry *J. S.* he did promiſe that he would pay the plaintiff 40*l.* if the ſaid marriage took effect; the plaintiff in fact ſays, That he at ſuch a day and divers other days and times at the requeſt of the defendant *omnibus modis quibus poterat conatus fuit* to perſuade the ſaid *C. R.* to marry the ſaid *J. S.* and that after ſuch a day the marriage took effect, and that the defendant had not paid him the 40*l.* *&c.* and though the plaintiff doth not ſhew how he did endeavour to perſuade, *&c.* yet it was held good enough on error brought thereupon, *P.* 400

In conſideration the plaintiff would renounce an executorſhip, the defendant would pay, *&c.* The plaintiff avers *quod renunciavit*; and held good, and yet perhaps the perſon before whom the renunciation was, might not be competent, *ibid.*

The plaintiff being a virgin had been prevailed with to make a contract with the defendant, and after the defendant was deſirous to be free, and thereupon the defendant in conſideration that the plaintiff would *diſenerare*, Anglice *diſengage*, him of his promiſe, he promiſed to pay her 1000*l.* and ſhe alledges, that ſhe did diſengage him, without ſhewing how; and the whole court ſeemed to agree the declaration good, 400, 401

Though it is frequent to lay a declaration for a debt ſeveral ways in an *Aſſumpſit*, yet it's not a good plea to ſay that the ſeveral ſums are but only for the ſum firſt mentioned, without going farther, 449

ATTACHMENT.

Attachment doth not lie againſt a corporation, 152

Attachment denied to be granted for the breach of a rule of court had by conſent, for the performance of an award, 35

Upon a judgment in *B. R.* a *Fieri Fac.*

Fac. iſſued (after a *Teſtatum*) to the ſheriff of *Cheſter*, who returns *Quod fieri fecit* the goods, but that they remained in his hands *pro defectu emptor.* on that a *Venditioni Exponas* iſſues, of which he makes no return, nor any ſatisfaction to the plaintiff, and for that an attachment was granted, *Page* 171

An attachment granted againſt commiſſioners of ſewers, for proceeding after *Certiorari* directed, 186

If a writ of error be brought of a judgment in a pye-powder court, it is no contempt in the town-clerk if he doth not certify it, until final judgment given, for the writ of error commands to certify *Si Judicium redditum ſit*, and an attachment denied, 190

An attachment granted againſt the bailiff of a liberty, who on a *Latitat* had arreſted the defendant and taken ſureties, and returned a *Cepi Corpus*, but never brought in the body, but combining with the defendant, let him go at liberty, *&c.* 193

ATTORNEY and *WARRANT of ATTORNEY.*

A warrant of attorney is given to one to confeſs judgment in debt to the plaintiff, at eight o'clock in the morning, and at ten o'clock, before the judgment ſigned by the ſecondary; the defendant dies. Reſolved the judgment is well obtained, and ſhall not be ſet aſide, 18

An attorney may plead and join iſſue, That the plaintiff is alive, and it ſhall not be error, although he be found dead, 59

The plaintiff obtained a judgment in debt, and received the money, and made a letter of attorney to acknowledge ſatisfaction, and after, and before ſatisfaction acknowledged, revokes his warrant. And the court gave rule, That no proceeding ſhould be on the judgment without motion firſt made in court, *Page* 69

It's a good plea to action brought by an attorney for his fees, That the plaintiff did not give the defendant any bill of charges, according to the ſtatute 3 *Jac. cap.* 7. 245

ATTORNMENT.

If a copyholder ſurrender his reverſion there needs no attornment, 18

The reverſion of dutchy lands paſſes by the dutchy ſeal without attornment, 90, 91

A common perſon may compel the tenant to attorn, but the king cannot, for a *Quid Juris Clamat* doth not lie for the king, for that a fine by the king is always by render, 91

If a fine be levied to an uſe, the *Ceſtuy que uſe* ſhall have the rent without attornment, 91

Want of attornment is aided after verdict, 487

The reverſion of a term for years granted for a valuable conſideration, doth not paſs by the ſtatute of uſes, without attornment, *ib.*

AUDITA QUERELA.

An *Audita Querela* is a new kind of action, and commenced only in the 10 *Ed.* 3. and not before, 89

An *Audita Querela* doth not lie where there is another remedy in law for the plaintiff, either by plea, or otherwise, *Page* 89

Sometimes an *Audita Querela* doth not lie although there be not any other remedy. *In marg.* *ibid.*

AULNAGE.

Though aulnage is only payable for woollen cloth, yet it has been resolved that linsey-woolsey shall pay aulnage, though but part wool, 312

AVOWRY, see *PRESCRIPTION* and *REPLEVIN.*

One having avowed for rent at *Michaelmas* is not estopped to distrain and avow for arrearages at *Lady-day* before, otherwise it is of an acquittance 21

Replevin, the defendant makes conusance to *A.* that one *Knight* was seised of the place, in which, &c. and granted a rent-charge to *A.* and so makes conusance for 10 years. The plaintiff replies in bar, That *Knight* was not seised in fee. The defendant demurs, and leave given to discontinue, &c. 64

Replevin, the defendant avows for a rent-charge. The plaintiff pleads in bar *Non concessit*; and on this issue is taken according to the statute of 17 *Car.* 2. *cap.* 7. and the jury found the value of the cattle, but not the arrears: and the court ruled judgment not to be entered on this finding, but the avowant may have judgment at the common law if he pleases, 170

In a replevin, the defendant avows the taking, for that he is seised of the manor of *A.* to which he hath a leet belonging, and that by custom, time out of mind used, the inhabitants used to send a constable to the said leet, and that he before *H.* his steward at *A.* held the said leet, and gave notice thereof at *D.* and that they did not send a constable, and thereupon the said steward imposed a fine of 39*s.* 11*d.* and that he distrained the plaintiff; and held a good custom, *Page* 204

But because the avowant had not alledged a custom also to distrain, it seemed to *Twisden* justice, That the distress was not well taken, for when a duty is raised by custom, a distress for that duty must be maintained by the like custom, 204

In a replevin, defendant makes conusance as bailiff to the lord of the leet, because the plaintiff was amerced there for not scouring a ditch in a highway, plaintiff demurred, because the statute of 18 *Eliz. cap.* 9. gives the forfeitures for highways to the surveyors, and held the party may be punished in the leet, notwithstanding, 250

If the rent of tenant for years be arrear, the lessor cannot avow upon the termor upon the land, but upon the matter, 257

The different way of pleading in an avowry at common law, and upon the statute, 257, 258

In an avowry for an amerciament in a leet, it is not sufficient to say, *præsentatum fuit* at the leet, that the plaintiff did such an act, but he must aver the thing, and not

not rely upon the preſentment, *Page* 337

BAIL.

SPECIAL bail granted by the court in an action for words againſt a nobleman, 74

Notwithſtanding a writ of error, the bail may bring in the principal in diſcharge of the mainpernors, 100

A perſon accuſed of high treaſon, and not within the act for *Habeas Corpus's*, is not *de jure* to be bailed by this court, 381

In a *Homine Replig.* unleſs the defendant will confeſs the taking and having the party in cuſtody, he cannot be bailed, 474, 475

BANKRUPT.

The plaintiff declares on the ſtatute of bankrupts, That the defendant was indebted to one *Studder* and the plaintiff in a joint obligation. *Studder* becomes a bankrupt, and this debt is aſſigned to the plaintiff by the commiſſioners to the uſe of the creditors, if this aſſignment be good? *Quære* 6, 7

An aſſignee of commiſſioners of bankrupts brings an *Indebitatus* for 42*l.* upon an aſſignment of a debt due by contract of 43*l.* and upon *Non Aſſumpſit* on a ſpecial verdict, reſolved for the plaintiff; for though in ſtrictneſs it is not good, yet in favour of creditors it was held good, 7

Although the commiſſioners have ſole authority to adjudge a man a bankrupt, yet in an action the jury muſt find whether he was a bankrupt or no, *Page* 337

A trader in *Ireland* may be within the ſtatute of bankrupts, 375, 376

Staley being a trader, becomes indebted by bond and judgment to *D. W.* in 100*l.* and to *Eliz. C.* in 100*l.* and to ſeveral other perſons. The 5th of *July* 1677, *Eliz.* makes her will, and *J. Crew* her ſole executor, and dies: the 6th of *Novemb.* 1678 *Crew* arreſts *Staley* for 1000*l.* who preſently puts in ſufficient bail. 18 *Novemb.* 1678 *Staley* pays *D. W.* 1000*l.* and the ſame day renders himſelf to priſon in diſcharge of his bail, and lies in priſon to the time of the action, above two years. 20 *Feb.* 1678 a commiſſion iſſues out, the 14 of *May* following the commiſſioners aſſign *Staley*'s eſtate to the plaintiff. And the ſole queſtion was, whether *Staley* ſhould be accounted a bankrupt on the 6th of *Novemb.* 1678, which was the day of his arreſt, or only from the time that he rendered himſelf in diſcharge of his bail? And adjudged in *C. B.* That he ſhall be accounted a bankrupt only from the time that he rendered himſelf in diſcharge of his bail; after a writ of error was brought here, but left undetermined, 479, 480, 481

BAR, vide *PLEADING.*

Trover of divers goods, defendants plead an action of treſpaſs *vi & armis*, brought againſt them formerly, for taking and diſpoſing the ſame goods, and upon Not guilty

guilty pleaded, verdict for the defendants; judgment *ſi actio*, plaintiff demurs; and adjudged for the plaintiff in this action of trover, becauſe trover and treſpaſs are actions ſometimes of a different nature, for trover will ſometimes lie where treſpaſs *vi & armis* will not lie, *Page* 472

As if a man have my goods by my delivery to keep for me, and I afterwards demand them, and he refuſes to deliver them, I may have an action of trover, but not treſpaſs *vi & armis*, becauſe here was no tortious taking, *ibid.*

Sometimes the caſe may be ſuch, that either the one or the other will lie, as where there is a tortious taking of goods and detaining them, the party may have either trover or treſpaſs, and in ſuch caſe judgment in one action is a bar in the other, 472

Whereſoever the ſame evidence will maintain both the actions, there the recovery and judgment in the one may be pleaded in bar againſt the other, otherwiſe not, *ibid.*

In the principal caſe, it was ſaid by the court, That it ſhall be preſumed that the plaintiffs in the firſt action had miſtaken their action, for they had brought a treſpaſs *vi & armis*, whereas they had no evidence to prove a wrongful taking, but only a demand and denial, and ſo the verdict paſſed againſt them, and ſo forced to bring this new action; by three juſtices, *Dolben* juſtice *hæſitante*, 472

Obligation pleaded in bar of a ſimple contract, 449

BARGAIN and SALE.

A. ſeiſed of a rent-charge in fee (the rent being arrear) by indenture of bargain and ſale, duly enrolled, granted the ſaid rent and arrears thereof to *B.* and held the arrears being a thing in action and not grantable over, nor yet the rent, for want of conſideration, there being no money alledged to be paid, and it cannot be good by way of bargain and ſale on the ſtatute, without money, *Page* 201

BILL of EXCEPTIONS.

The form of a bill of exceptions to the proceedings in the *Common Bench* in *Ireland*, 404

Error of judgment in *C. B.* in *Ireland*, in ejectment. The queſtion was upon the bill of exceptions, for that the juſtices there would not direct the jury, that the probate of a will before the archbiſhop of *Canterbury*, and alſo before the biſhop of *Fernes*, were ſufficient concluding evidence, but only affirmed that they were good evidence, leaving it to the jury. To which the other party ſhewed in evidence letters of adminiſtration under ſeal of the primate of *Ireland*; whereupon the jury found no ſuch will, and judgment there given for the plaintiff, and error brought here by defendant, and judgment affirmed, 404, 405

A bill of exceptions does not extend where priſoners are indicted at the ſuit of the king, 486

BY-LAW, vide *LONDON.*

CAPIAS,

CAPIAS, vide *PROCESS*.

A CAPIAS may be the first process in an action of the case, within an inferior jurisdiction, *Pages* 129, 130
Summons doth not lie in an action on the case, but a *Capias* lies in trespass in any case, 129, 130
Summons is not a process in an action on the case, but a *Pone*, *ibid.*
The statute of 19 *Hen.* 7. *cap.* 9. doth not give the *Capias* alone, but at the common law, where originally there was not summons, but a *Pone*, a *Capias* lay, 130
In all indictments for trespass, and under treason, a *Venire Facias* is the first process, and not a *Capias*, 375

CERTIORARI.

When one prays a *Certiorari* at a judge's chamber, to remove an indictment out of *London* or *Middlesex*, he ought to give notice of his desire to the other side, three days before, or otherwise the *Certiorari* is not to be granted. By *Twisden* justice, 74
A *Certiorari* lies into *Wales*, 206
A *Certiorari* was granted to the mayor, jurats and commonalty of the ancient town of *Winchelsea* in *Sussex*, to remove an order or decree made by them, who return (amongst other things) That *Winchelsea* is a member of the Cinque Ports, and that all the said Cinque Ports with their members, by reason of their situation near the sea-shores, as well for the safe keeping the said towns, as of the kingdom of *England*, against foreign invasions of enemies, have always and ought to keep beacons, watch-houses, &c. night and day, by sea and land; and for the better maintenance thereof, the said town used to make taxes upon every inhabitant and occupier of house or land lying within the said town, and liberty thereof, which privileges were confirmed by *Magna Charta*. That the 1st of *May* 32 *Car.* 2. they made a tax of 6*d.* *per* pound for maintaining the said beacon and watch-houses, and that there was no other order or decree. 1. Resolved, though it is not set forth, That the beacons or watch-houses were in decay, or out of repair, it is well enough; for it would be dangerous to expect till they became in decay. 2. It is to be presumed the inhabitants will not tax themselves unnecessarily, being they all concur in the taxation; and the order was confirmed, *Pages* 448, 449

CHALLENGE.

In an information, the counsel for the king challenged some of the jurors, and the court held, That by the statute of the 33 *Ed.* 1. the king ought to shew cause of his challenge, but not before all the jurors of the panel are called over; for if there be enough besides, no cause shall be shewn of the challenge, 473, 474
No challenge ought to be allowed contrary to the record itself, 485
In an information brought against citizens of the city of *Worcester*, a challenge was taken to the polls,

polls, becauſe the jurors had not any freehold within the ſaid city; and the court held that it was no good challenge, for that the ſtatute of 2 *Hen.* 5. *cap.* 3. extends not to this caſe, for that it is only in cauſes betwixt party and party, nor doth the ſtatute 35 *Hen.* 8. *cap.* 6. reach thereto, but only to ſheriffs of counties at large; for if a panel made in corporations muſt have freehold jurors, they muſt likewiſe have ſix hundredors, which cannot be in any corporation in *England*; and with them the judges in *C. B.* concurred in opinion, *Pages* 485, 486

COMMISSIONERS of CHARITABLE USES.

In an avowry, two queſtions aroſe; Firſt, Whether the commiſſioners of charitable uſes may add a power of diſtreſs where there was none by the original gift? Secondly, If ſuch commiſſioners in *Cheſhire* can bind lands in *Eſſex*, with ſuch clauſe. Adjourned, and adjudged for the avowant in both points that they may; *ſed Quære*, 209

Where it is ſaid, That if a copyholder deviſes without ſurrender to a charitable uſe, or tenant in tail ſo deviſes, that it is good againſt his iſſue, it is not intended good by the common law, but to be made good by the decree of the *Chancery*, grounded upon the ſtatute of 43 *Eliz. cap.* 4. By *Maynard* ſerjeant, 249

COMMON and COMMONERS.

A commoner cannot without deed licenſe a ſtranger to put in his cattle into the common, *P.* 171

COMMON RECOVERY, ſee *ERROR.*

It is no error in a common recovery, although it doth not appear that there was not any warrant of attorney for appearance, 70, 96

It is not error in a common recovery becauſe the ſummons bears teſte ſubſequent to the return of the *Dedimus*, *ibid.*

A *Dedimus Poteſtatem* is not part of a fine, but a warrant of attorney is part of the recovery, 71

A. tenant for life, the remainder to the uſe of *B.* in tail, the remainder to *C.* in tail, the remainder to the right heirs of *D.* provided that *A.* ſhall have power to make leaſes for years in poſſeſſion, reverſion, or contingency. *A.* makes a leaſe for years, to commence after the death of *B.* without iſſue, 236

And held by *Hale* chief juſtice, That *B.* may bar this leaſe by a recovery, although this ariſe precedent to the eſtate-tail, becauſe it is in continuance of the eſtate of *B.* *ibid.*

A common recovery bars tenant in fee-ſimple at this day, though there be no tenant of the freehold. By *Maynard*, 323

Recoveries in adverſary writs did bar in all caſes, till the *Quod ei deforceat* was given by *Weſtm.* 2. *cap.* 4. By *Maynard*, 322, 323, 349

Lands are limited to the uſe of *E.* *L.* for his life, the remainder to his firſt, ſecond, third and fourth ſons ſucceſſively, and the heirs male

male of their reſpective bodies, and ſo ſeverally and reſpectively to every of the heirs male of the body of the ſaid *E. L.* and the heirs male of the body of ſuch heirs male, according to their ages and ſeniorities, the remainder to *W. L. &c. E. L.* ſuffers a recovery and dies without iſſue male; and if *E. L.* had an eſtate-tail, or only an eſtate for life, was the queſtion. And judgment was given in *B. R.* that *E. L.* had only an eſtate for life; and on a writ of error brought the judgment was reverſed here, and adjudged to be an eſtate-tail in *E. L.* and ſo the recovery well ſuffered by him, *Pages* 278, 302, 315

CONDITION, vide *OBLIGATION.*

Leſſee for years, upon condition that the leſſee ſhall not aſſign over his term to any but his kindred without licence from the leſſor, the leſſor aſſigns over his reverſion, and the leſſee aſſigns over his term and breaks the condition; and if the grantee of the reverſion ſhall take advantage of the condition was the *Quære*, doubted, 250

If lands be given to two upon condition, that they ſhall not alien, and one releaſes to the other, it is no breach of the condition, 413, 414

CONSPIRACY, vide *TRESPASS.*

Before the ſtatute of 33 *Ed.* 1. *de Conſpiratoribus*, an action of conſpiracy did not lie for any thing beſides for indicting one for felony and treaſon; but by this ſtatute it lies for treſpaſs, and againſt one only, *Pages* 176, 180

COPYHOLD.

If the fine of a copyholder be uncertain, and the place and time appointed for payment of it is aſſerted, it ſeems there ought to be a demand, becauſe it is in point of forfeiture, 42

If there be a real doubt, whether the cuſtom be to pay a fine certain or uncertain, if the tenant deny to pay an uncertain fine, this is not any forfeiture although it be found after that the fine ought to be certain, but then ſuch doubt ought to be real and not covenous, *ibid.*

If a copyholder ſurrender his reverſion there needs no attornment, 18

A copyholder for life, the remainder for life, (where the cuſtom of the manor is that the perſon firſt nominated in the copy may ſurrender into the hands of the lord according to the cuſtom of the manor, and by ſuch ſurrender may deſtroy all the right of him in remainder) the firſt tenant for life joins in a fine *ſur conuſance de droit, &c.* with the lord of the manor, comprizing the manor and the copyhold; and this was to the uſe of the copyholder for life; and the queſtion was, If this fine be a ſurrender within this cuſtom to bar the eſtate in remainder; and reſolved it is not. 1. For that the cuſtom extends only to the copyhold eſtate, and that cannot paſs by the fine. 2.

It being againſt the common right, it ſhall be taken ſtrictly, *Pages* 402, 403

A cuſtom within a manor that upon a ſurrender made to one and his heirs, if the ſurrenderee comes not in upon the third proclamation, he ſhall forfeit his eſtate; if a ſurrender be made to the uſe of *A.* for life, the remainder to *B.* in fee, if *A.* comes not in, *B.* ſhall not forfeit, 404

CORONE, vide *TREASON.*

J. Manning indicted in *Surry* for murder; on not guilty, the jury at the aſſizes find, that the ſaid *Manning* found the perſon killed committing adultery with his wife in the very act, and flung a joint-ſtool at him, and with the ſame killed him; and reſolved by the court this is but manſlaughter, becauſe of the greatneſs of the provocation, 212

Charging a robber before a juſtice preſent is a good taking within 27 *Eliz. cap.* 13. in diſcharge of the hundred, 221

Two *Frenchmen* were condemned for clipping, and all the juſtices were of opinion, that the judgment given ought only, *to be drawn and hanged*, contrary to the opinion of *Coke* in his 3*d Inſtitutes.* 234

A. comes into a ſempſtreſs's ſhop, and aſked to ſee two crevats, which ſhe ſhewed to him, and delivered into his hands, who aſked the price of them, ſhe told him 7 *s.* whereupon the ſaid *A.* offered 3 *s.* and immediately ran out of the ſaid ſhop, and took away the ſaid goods openly in her ſight; and it ſeemed to the court to be felony, for that his running away with them, explains his intent precedent, *Pages* 275, 276

The ſuing a *replevin* to get the horſe of another man's to which he hath no title, is felony, becauſe *in fraudem Legis* 276

So if an officer cometh to a man, and telleth him that he is outlawed, when the officer knoweth the contrary to be true, and by colour thereof taketh his goods, it is felony, *ibid.*

One *Farr* was found guilty of felony for taking of goods in an houſe which he entered by colour of law, and executed, *ibid.*

Burning in the hand is part of the judgment in felony, 370

If the principal be attainted of burglary, the acceſſory muſt anſwer, though the principal be pardoned; but if the principal have either his clergy, or be acquitted, or obtain his pardon before judgment, the acceſſory ſhall not be queſtioned, 477

Before *Ed.* 3. an infant could not bring an appeal, but ſince it is frequent, 483

CORPORATION vide *LONDON.*

Attachment doth not lie againſt a corporation, 152

A corporation that hath a patent to make a town-clerk *durante bene placito* of the mayor and aldermen, may turn him out at their will and pleaſure, 188

But an alderman cannot be ſo turned out. *ibid.*

Where time out of mind a corporation had power to remove an alderman for reaſonable cauſe, though they take a new charter, wherein there is no ſuch power given the corporation, yet the ſame power ſtill remains; for the new charter doth not merge or extinguiſh any of the ancient privileges, but the corporation may uſe them as before, *Page* 439

COSTS.

In a writ of error to reverſe a common recovery where judgment was affirmed, no coſts to be given becauſe no delay of execution, 134, 135

At the common law there was no coſts in a writ of error, 135

Coſts at the diſcretion of the court, 38

In an action of treſpaſs *vi & armis* brought for deſtroying his goods, the plaintiff ſhall have his ordinary coſts though the damages be under 40 *s.* for that the ſtatute of 22 & 23 *Car.* 2. *cap.* 5. reaches only to ſuch actions in which the freehold may come in debate, 487, 488

COVENANT.

A covenant on payment of a ſum to cauſe a recognizance to be cancelled, and the ſame to be vacated before ſuch a day, although he do ſo, yet if he ſue execution before, it is a breach, 25, 26

Leſſee for years grants to the plaintiff ſo much of his term as ſhould be to come at the time of his death, and covenanted that he ſhould enjoy it, and gave bond to perform covenants, and made the defendant his executor, and died, who entered, and ouſted the plaintiff; and in debt on this obligation adjudged that the grant was void, and there being no grant, there could be no covenant, and ſo no bond, *Page* 27

It is agreed that *A.* ſhall pay *B.* 700 *l.* for the land in *D.* covenant lies againſt *B.* if he will not convey the land, 183

Leſſee for years covenants to repair, *proviſo* that the leſſor find grand timber, there in an action of covenant the plaintiff ought to aver that he offered grand timber, for they are mutual covenants, 183

On a covenant to make farther aſſurance, it ſeems the covenantor is not obliged to make it with covenants, 190

But by *Twiſden* Juſtice, the law is altered ſince *Cole* and *Kinder*'s caſe, in *Cro. Jac.* as to covenants in a conveyance, if they be reaſonable they may be inſerted, but not that he is ſeiſed of an abſolute eſtate in fee-ſimple, or the like, 191

A covenant for the true impriſonment of *J. S.* and alſo to pay chamber-rent, *&c.* is a covenant for eaſe and favour, and ſo within the ſtatute of 8 *Hen.* 6. 222

If leſſee for years be diſtrained by the lord paramount, though he cannot have a writ of meſne, yet he ſhall have a writ of covenant in lieu thereof, 257

If an agreement be, that the plaintiff from thenceforward ſhall quietly receive all the tithes of ſuch cloſes without any interruption or moleſtation; adjudged a ſuit

suit in equity is a breach of his agreement, *Page* 371

A covenant not to assign a *chose in action* to any person whatsoever, an assignment in equity is a breach of the covenant, for in law no assignment can be of a thing in action, therefore the intent of the covenant must be of such assignment as can be, that is, an assignment in equity admitted, 459, 460, 461

When covenants are joint, and when several, *ibid.*

The defendant (being a brewer) covenants that the plaintiff shall have seven parts of all the grains made in the defendant's brewhouse, for seven years then next following, and assigns a breach, that the defendant with intention to deceive the plaintiff, did put divers quantities of hops into the malt, of which the grains were made, by reason whereof the grains were spoiled, and became unprofitable to the plaintiff, and verdict and judgment for the plaintiff, although objected that the grains were delivered according to covenant; and though the defendant had mixed hops, an action of the case lies in that case, and not covenant, 464

If I covenant that I will leave all the timber, which is growing on the land I hire, on the land at the end of the term; if I cut it down, though I leave it on the land, it is a breach of my covenant, *ibid.*

CUSTOM, vide *LONDON*.

A custom alledged *in facto* not *in jure*, is naught, 4

As a custom, that every man may turn his plough upon the next land adjoining, if it is not sown with corn, is naught, without adding the usage, *Page* 4

A custom found within a manor, that every tenant of the said manor *potuisset surfum reddere*, &c. ill. *ibid.*

So *licet & licuit* for the lord to set a pain for the breach of a by-law, adjudged void, 25

A custom within the manor of *Westham* in *Essex*, that the wife shall be endowed of the moiety of all such copyhold lands as her husband was seized of, 58

Unity of possession destroys a custom, 192

If a custom laid in occupiers be good? *ibid.*

That *H.* being seised of the manor of *A.* to which he hath a leet belonging by custom time out of mind, the inhabitants of *D.* used to send a constable to the said leet, and that a leet was held such a day, and notice thereof given at *D.* and they did not send a constable, and that the steward imposed a fine of 39*s.* 11*d.* on the inhabitants, for which he distrained; held a good custom, 204

But when a duty is raised by custom, a distress for that duty must be maintained by the like custom, and incident to it; *quære*. *ibid.*

DAMAGES, and *INQUIRY* of *DAMAGES*.

IN detinue, the omission of the value of the charters in the verdict

dict may be supplied by a writ of inquiry, *Page* 124
In an attachment on a prohibition where damages are given for the plaintiff, there he ought to lay a viſne where the ſuit in the eccleſiaſtical court was; otherwiſe the want of a viſne hurts not, 387, 388

DEBT.

In debt for rent, the plaintiff demiſes by indenture a houſe to a widow, rendering rent, the defendant marries her, the rent is behind during coverture, the wife dies, and the plaintiff brings debt on the indenture againſt the huſband; and adjudged on demurrer, it well lies, 6
A. ſeiſed of lands in fee, demiſes to the defendant for twenty-one years rendering rent during the term, and then grants the rent only (without the reverſion) to the plaintiff and his aſſigns, during the term, and the defendant attorns, and for rent behind the plaintiff brings debt, and on *Nil debet* found for the plaintiff, and moved in arreſt of judgment, that debt lies not for want of privity; the court was divided, and no judgment was given, 11, 12
Debt lies for an annuity granted for years, *ibid.*
Debt lies upon a leaſe of a fair, and therefore a biſhop may grant a fair for years, becauſe debt lies, but not for life, *ibid.*
By *Wyndham* juſtice, *ibid.*
If an annuity be arrear, and the grantee dies, his executors ſhall have debt, becauſe the perſon of the executor was originally charged, *Page* 11
A ſeigniory in fee is granted for years, the grantee ſhall not have debt becauſe it is out of a fee, *ibid.*
But after the term expired he ſhall have debt. By *Twiſden* juſtice, 11
Debt lieth not againſt the bail on his recognizance upon a judgment given againſt the principal, 14
Tenant pur auter vie of tithes in groſs, makes a leaſe for years, rendering rent, and dies, his executors bring debt for the rent, and the defendant demurs to the count; and by the better opinion of the court the action lies not, 18
If the father deſires one to find phyſick for his daughter, debt lies againſt the father, 67
Debt lies for a fine impoſed on one for a contempt committed in a court-leet, 68
Debt lies upon a judgment as well after a writ of error brought, as before, 100
In debt for rent againſt an aſſignee, *quære* if he may plead aſſignment over without pleading notice, 162
Debt is brought on a deed poll, on oyer it was in theſe words, *it is agreed that* A. *ſhall pay to* B. 700l. *for the lands in* D. and held that debt lies upon it, 183
In debt for rent for ſix years upon a leaſe for years to the defendant for tithes, the defendant as to the two years pleads *Nil debet*, and as to the other four years he pleads, that before any of the ſaid rent incurred, he aſſigned over

over the ſaid leaſe and tithes to one *V.* of which the plaintiff had notice, and did receive the rent. Judgment *ſi actio.*

The points were two,

1. When the dean and chapter make a leaſe of tithes, rendering rent, whether the money reſerved be a ſum in groſs or a rent?
2. Admitting it to be a rent, if the acceptance ſhall bind as in caſe of a private perſon?

The caſe is not reſolved, but as to the ſecond point *Twiſden* juſtice held the acceptance void.

Leſſee for life makes a leaſe for years, leſſee for years ſurrenders to the reverſioner, rendering rent; adjudged an action of debt well lies for the rent, becauſe it is a duty by way of contract, *Page* 222

Declaration in debt for rent arrears, is good, without ſhewing the mean aſſignments, upon a demurrer, 389, 390

In an action of debt *Qui tam*, upon the ſtatute of 23 *Eliz. cap.* 1. for not coming to church, it ſeems conformity doth not diſcharge the penalty due, 391, 392

But by the act of 1 *Jac. cap.* 4. the defendant is diſcharged in ſuch caſe by his conformity, 466

Debt upon the ſtatute of 23 *Eliz. cap.* 1. for not coming to church, may be brought in this court notwithſtanding the ſtatute of 21 *Jac. cap.* 4. 394

An action of debt cannot be commenced before juſtices of aſſiſe, *ibid.*

In debt for rent on a leaſe for years, the defendant pleads, that on *Chriſtmas day* (being the quarter-day) he was at the ſaid meſſuage by the ſpace of an hour before ſun-riſing, until ſun-ſetting of the ſame day, and that neither the plaintiff nor any other on her behalf came or was ready there to receive it, and that always ſince the ſaid day hath been, and yet is ready to pay the ſame: the plaintiff demurs, for that the defendant hath not alledged a tender, but only that he was ready there to pay; but adjudged for the defendant; for tender needs not, but where there is a condition, *Pages* 418, 419

DEMURRER, vide *PLEADINGS.*

If a plea conclude *hoc paratus eſt verificare*, where it ſhould be *hoc petit quod inquiratur*, it is ſubſtance on a general demurrer, 94, 98

Declaration in debt for rent arrear, is good without ſhewing mean aſſignments upon a demurrer, 389, 390

DEODAND.

One in ringing was taken up by the bell-rope, and by it was killed, and if the bell was a *Deodand*, was the queſtion; *dubitatur*, 97

A mill-wheel cannot be a *Deodand*, by *Hide* chief juſtice, *ibid.*

There may be a *Deodand* where the party ſlain is under the age of diſcretion. By *Twiſden* and *Morton* juſtices, 208

DEPARTURE, vide *PLEADING.*

The plaintiff counts upon an indenture of apprenticeſhip; the defendan

defendant pleads, that at the time of the entering into the ſaid indenture he was an infant: the plaintiff replies, that by the cuſtom of the city of *London*, if one under age binds himſelf apprentice it ſhall be good againſt him; and the doubt on demurrer was, if this be a departure? the court was divided, *Page* 60

If in covenant the defendant plead performance, and after rejoin that the plaintiff ouſted him, it is a departure, 22

If the plaintiff in his replication depart from his count, if the defendant takes iſſue upon it, and it be found for the plaintiff, the defendant ſhall take no advantage of that departure, otherwiſe if he had demurred upon it, 86

If a rejoinder confeſs that which was denied in the bar, it is a departure, 94

DEVISE, vide *REMAINDER*.

A woman having two ſons by divers huſbands (which were dead) *(viz.)* *Thomas* by the firſt huſband, and *Leonard* by the ſecond, deviſes the lands in queſtion to *Thomas* for life, and if he die without iſſue of his body living at the time of his death, then to *L.* in fee; but if *Thomas* have iſſue living at the time of his death, then the fee ſhall remain to the right heirs of *Thomas* for ever; the woman died, *Thomas* entered, and ſuffered a recovery, and dies without iſſue. 1. And held *Thomas* had an eſtate but for life only, with a contingent remainder to *Leonard*, which was barred by the recovery, *Pages* 28, 29, 30

2. A deviſe to one who is (heir) for life, the remainder in contingency is good, and the diſcent of the reverſion ſhall not drown his eſtate for life, 28, 29, 30

What ſhall be ſaid an executory deviſe, and what a contingent remainder, *ibid.*

Executory deviſes are grounded on the common law, 83

Capite lands were given to the huſband and wife, and the heirs of the huſband, and the huſband being alſo ſole ſeiſed of ſocage lands, deviſes all his ſocage lands and dies, living his wife; and reſolved it is a good deviſe for the whole, by three juſtices, 39, 40

If lands be given to two, and the heirs of one of them, that reverſion is not deviſable; by *Windham* and *Twiſden* juſtices, 40

If lands be given to two, and the heirs of one of them, and he that hath the fee dieth, no wardſhip can be, for the ſurvivor remained tenant during life, *ibid.*

Stephen Norton ſeiſed in fee of the lands in queſtion, in 1651, made his will in writing, and gave divers legacies, &c. Item, *I give to my brother* Anthony Norton 30 *l.* per annum. Item, *I give my lands in* Kent *and* Suſſex *to one of my couſin* Nicholas Amhurſt's *daughters that ſhall marry with a* Norton *within fifteen years*; *and I make* Nicholas Amhurſt *my executor*. *Nicholas Amhurſt* had three daughters, *Elizabeth*, *Anne* and *Mary*; *Stephen Norton* the defendant marries *Elizabeth*,

zabeth, and the leſſor of the plaintiff marries the heir at law. And whether the heir at law, or the deviſee ſhall have the lands, was the queſtion? And reſolved that the deviſee ſhall have the lands, and that the deviſe was good notwithſtanding the incertainty, and that although the words are not *who ſhall firſt marry with a* Norton, yet the law ſupplies theſe words as well in a deviſe as grant, *Page* 82

A deviſe to *A.* for fifteen years, the remainder to the right heirs of *J. D.* is not good; but to *A.* for fifteen years, the remainder to the firſt ſon of *J. D.* is good, becauſe the deviſor takes notice that he hath not a ſon, and intends a future act, and the law aids him which was *inops conſilii*; by *Bridgman* chief juſtice, 83

A deviſe to an infant *in ventre ſa mere* for fifteen years, the remainder over is good by way of executory deviſe, *ibid.*

An eſtate *in futuro*, and a contingent precedent makes an executory deviſe, *ibid.*

I give all to my mother, all to my mother; reſolved lands do not paſs by theſe words, 97

Sarah the wife ſeiſed in fee of a copyhold, ſurrenders to the uſe of herſelf and *R.* her huſband, and the heirs of the huſband, the huſband after ſurrenders to the uſe of his will, and by his will deviſes the land by theſe words; *my lands in* Hackney *which were my wife's, and now hers for life, I give to the heirs of the body of my ſaid wife, if that he or they live till fourteen years of age*; *and for want of ſuch heirs, then to* William Jacob *and his heirs.* *R.* the deviſor dies, *Sarah* his wife ſurvives and marries *H. C.* by whom ſhe had iſſue the leſſor of the plaintiff. *H. C.* ſuffers a recovery, *Sarah* dies, and the leſſor of the plaintiff enters, and the heir of *R.* the deviſor enters upon him. *The points were*, 1*ſt*, what paſſes by the will? and on that point the court was divided in opinion. 2*dly*, what operation the recovery hath? and held the recovery works nothing becauſe copyhold, and a recovery of a copyhold doth not dock the remainder without cuſtom, *Pages* 162, 163, 164

Where there is a precedent deviſe, there ſhall not be a contingent executory deviſe; by *Wyndham* juſtice 164

A deviſe to an infant *in ventre ſa mere* if good; *quære.* *ibid.*

A deviſe to *J. S.* when he marries ſuch a one is good, but no eſtate veſts till marriage; by *Twiſden* juſtice, *ibid.*

The earl of *N.* ſeiſed of *Newparthouſe* in fee, deviſes the ſame to his lady for life, the remainder to *A.* his grand-child in tail, provided, and upon condition, that if the ſaid grand-child ſhould marry without the conſent of her grand-mother, and the earls of *Warwick* and *Mancheſter*, and the major part of them, or ſhould die without iſſue of her body, that then it ſhould remain unto *B.* one other of the deviſor's grand-children, and ſiſter to *A.* *A.* marries without conſent at her age of fourteen years, and had no notice of the will, 236, 237

1. Reſolved

1. Resolved it is a limitation and not a condition. 2. Notice of the condition was not necessary, for that none is appointed by the the devisor to give notice, *Pages* 236, 237

Temple and two others were tenants in common of a manor. *Temple* makes his will in writing of his third part, and after by indenture and fine, partition is made between the tenants in common, 240

And if this partition be a revocation of this will was the question; and it seemed to all the barons it was not any revocation; but judgment was not given, because the plaintiff obtained leave to discontinue, *ibid.*

A man seised of lands held *in Capite*, devises the whole to the corporation of the city of *Norwich*, upon a charitable use; and resolved the devise was only good for two parts, and not for the whole, 249

Where it is said, that if a copy-holder devise to a charitable use without surrender, or tenant in tail so devises, that it is good against the issue; it is not intended good by the common law, but to be made good by the decree of the Chancery grounded upon the statute of 43 *Eliz. cap.* 4. By *Maynard* serjeant, *ibid.*

Hen. W. being seised of lands in fee, devises them to *John Higden* and his heirs during the life of *Robert Durdant*, the remainder to the heirs males of *Robert Durdant* now living; and the question was, Whether *George Durdant*, the only son of the said *Robert*, shall take in remainder, during the life of his father? And resolved in *B. R.* That the devise vested an estate in remainder to *George* immediately after the death of the devisor, for that the words *heirs male (now living)* was in a will a manifest description of *George*, who then was heir apparent of *Robert*, and known to the devisor to be so, for he was his uncle and godfather; but after error being brought in the Exchequer-chamber, this judgment was reversed, *Pages* 330, 331

Note; *This case was after brought into parliament by writ of error, and the judgment in the Exchequer was reversed, and the judgment in* B. R. *affirmed.* Jones Rep. 99, 100.

The word *(Heir)* in a will may be intended the description of a person, but not when it is in the plural number, 333

Where an estate is limited to the heirs of the body of the father, it is an estate-tail, *ibid.*

He the 2 *September* 1679, makes his will in writing, and makes *Elizabeth* his wife his executrix, and gives her all the *Residuum* of his estate after some legacies paid, *Elizabeth* dies 5 *September* 1679, in the life-time of the testator, and he having notice of the death of his wife, makes a nuncupative will, dated 6 *September* 1679, and gives to *G. R.* all which he had given to his wife, and died 13 *September* 1679, and the *Quære* was, Whether this nuncupative codicil be allowable since the statute of frauds and perjuries? And resolved by commissioners of delegates, that the nuncupative

cupative codicil is good, for by the death of *Elizabeth* before the teſtator the deviſe of the *Reſiduum* became totally void, and ſo there was no will *quatenus* as to that part; and ſo the nuncupative will was *quaſi* a new will for ſo much, and was no alteration of the will as to ſo much, becauſe there was no ſuch will, its operation being determined,
Page 334

If *A.* be poſſeſſed of an eſtate of 1000*l.* and by his will in writing gives 500*l.* of it to *B.* he may give the reſidue by a nuncupative will, ſo as he do not alter the executor, 335

A. P. in *Feb.* 1649 makes his will in writing, and gives a legacy to his niece in theſe words, *I do ordain and give to my dear niece* Florence Roll, *ſecond daughter of my brother* Dennis Roll, *the ſum of* 500*l. which my ſiſter the lady* Cholmly *hath now in her hands of mine, as by her bond made to me appears.* And makes no executor, and dies in *Oct.* 69. About ten years before his death, the lady *Cholmly* paid him the 500*l.* And if the legacy is due is the queſtion, 335

And reſolved the legacy is due, though the ſecurity was altered, *ibid.*

If a man deviſe a legacy out of debts due in ſeveral counties, and the debts are called in before the teſtator's death, yet the legacy remains good, *ibid.*

The ſame law, if a legacy be given out of monies at intereſt, and called in before the teſtator's death, *ibid.*

But otherwiſe of a ſpecifick legacy, for that may be loſt by being altered, *ibid.*

R. B. being ſeiſed of lands in fee, and having iſſue *Robert* his younger ſon, who had iſſue *Robert*, by his will in writing deviſes his lands to *Robert* his ſon and his heirs, and gives to his grand-child *Robert* 100*l.* after *Robert* the ſon dies, and after *R. B.* the father by a codicil in writing deviſes part of the lands before given to his ſon *Robert*, by his will to another, and wills that the codicil be annexed and made part of his will, and the ſame day republiſhes his will, and then alſo *Animo Teſtandi*, by words without writing, declares That his grandchild *Robert* ſhall take and have by the ſaid will, as his ſon *Robert* might take and have. The deviſor dies, and *Robert* the grandſon enters, and the daughters and heirs of *William*, eldeſt ſon of *Robert* the grandfather, enter upon him, and leaſe to the plaintiff. Judgment was given in *C. B.* for the defendant; and error being brought upon this judgment, the judgment was reverſed by three juſtices, *contra Dolben* juſtice, *Pages* 408, 409

F. K. being ſeiſed of lands in fee, and having iſſue divers ſons and daughters, deviſes to his third ſon *Gerard K.* after the deceaſe of his wife, all the lands in queſtion, to him and his heirs for ever, provided always, and upon condition, That his ſon *Gerard* ſhall pay unto his daughter *Elizabeth* 100*l.* within ſix months after his wife's death, and at his age of 21 years, and for default of payment thereof accordingly, he gives the ſame to his ſaid daughter *Elizabeth*, and her heirs; and farther deviſes, That if his ſaid

ſaid ſon *Gerard* happen to die without iſſue, his daughter *Elizabeth*'s 100*l.* being firſt paid, then the remainder of his eſtate to be divided amongſt his ſons and daughters, and the ſurvivors of them; and the queſtion was, What eſtate *Gerard K.* took by this will, whether an eſtate in fee or in tail; and adjudged he had but an eſtate-tail, 425, *Pages* 426, *&c.*

John Cheek ſeiſed of houſes and lands in fee deviſeth, That his wife ſhall have and enjoy the ſame during her natural life, if ſhe do not marry; but if ſhe do marry, then he wills that his ſon *Humphrey* ſhall preſently after his mother's marriage enter and enjoy the ſaid premiſſes, to him and the heirs male of his body. In this caſe two points were ſtirred, 1*ſt*, What eſtate the teſtator intended for his wife in this will. 2*dly*, Whether the remainder to *Humphrey* be a contingent or veſted remainder? And adjudged ſhe hath an eſtate during her widowhood only and no more, and that it was no contingent remainder, but an eſtate veſted in *Humphrey*, to take effect in poſſeſſion upon the marriage or death of the wife, 427, 428, *&c.*

M. ſeiſed in fee deviſes all his lands in *M. Langley*, being the land in queſtion, unto his two daughters, *Elizabeth* and *Anne*, and their heirs, equally to be divided betwixt them, and in caſe they happen to die without iſſue, then he gives and deviſes all the ſaid lands to his nephew *F. M.* eldeſt ſon of his brother *W. M.* deceaſed, and to the heirs male of his body, with divers remainders over. The queſtion was, Whether *Anne* being dead without iſſue, and *Elizabeth* ſurviving, the ſaid *F. M.* who was the leſſor of the plaintiff, ſhall have that moiety of the lands, or *Elizabeth* the other ſiſter ſhall hold it to her and the heirs of her body, by way of remainder by implication; and adjudged that *F. M.* takes nothing upon the death of *Anne*, but that her part remains to her ſiſter *Elizabeth*, by way of a croſs remainder, *Pages* 452, 453, *&c.*

A deviſe governed by the intention, whether it be expreſſed in apt words or not, *ibid.*

DISCONTINUANCE.

An eſtate is limited to the huſband for life, the remainder to the wife for life, the remainder to the heirs of the body of the huſband, which he ſhall beget on the body of his wife, *&c.* the huſband and wife levy a fine, if this be a diſcontinuance, 36, 37, 38

None can diſcontinue an eſtate-tail, unleſs he diſcontinue the reverſion, and therefore if tenant in tail infeoff the donor, it is no diſcontinuance of the intail, 344

DISSEISIN.

In an aſſiſe between two tenants in common, a forbidding by word of mouth to the tenant to pay his rent, was adjudged a diſſeiſin, 371

Two tenants in ſpecial tail recover in an aſſiſe, and after one dies

without iſſue, and the other being tenant in tail after poſſibility, is re-diſſeiſed, he ſhall have a rediſſeiſin, becauſe it is the ſame freehold which he had before, and is part of the eſtate-tail; *Page* 484

DUTCHY.

Reverſion of *Dutchy* lands paſſes by the *Dutchy* ſeal, without attornment, 90, 91

By the ſtatute 37 *Hen.* 8. *cap.* 16. Lands lying out of the county palatine ſhall paſs under the *Dutchy* ſeal, 90

By the common law lands coming to the king in his natural capacity, participate of his prerogative, *ibid.*

The king within age may grant *Dutchy* lands, *ibid.*

Double uſurpation doth not put the king out of poſſeſſion of a church he hath in the right of his *Dutchy*, *ibid.*

An original out of the *Chancery* doth not run in *Wales*, as it doth in a county palatine, 206

EJECTMENT, vide *ERROR.*

EJECTMENT brought in this court of lands in the county of *Lancaſter*, if it lies, the defendant being in cuſtody, 81

In ejectment for 100 acres of bog, and other things, the plaintiff may releaſe his demand to them, and take judgment for the reſidue, 395

If the heir brings an ejectment, and his anceſtor dies ſubſequent to the action, he ſhall not recover; becauſe every one ſhall recover only according to the right which he hath at the time of bringing his action, *Page* 463

ERROR.

Error brought of a judgment in *B. R.* in parliament, and errors aſſigned, and the parliament diſſolved before they were determined; and held the writ of error is determined by the diſſolution of the parliament, 5

In error brought in parliament of a judgment in *B. R.* the tranſcript only of the record is carried up by the chief juſtice, and there left, and not the record itſelf, *ibid.*

But when a judgment of this court is reverſed there, the tranſcript is returned hither, and the record itſelf is tranſmitted thither, 5

Error of a judgment in an inferior court, for that the *Venire fac.* is, therefore it is commanded by the court, That he make to come twelve, *&c.* by whom, *&c.* and who, *&c.* in a brief manner, as in the courts at *Weſtminſter*, where it ought to be at large, in all inferior juriſdictions, the exception diſallowed, 20, 431

The reaſon for which nothing out of inferior courts ſhall be taken by intendment, is, becauſe there they only enter ſhort notes of their proceedings, and when they are to certify, the attornies here draw the records at large. By *Twiſden* juſtice, 21, 431

It is not error in a common recovery, becauſe the ſummons bears teſte ſubſequent to the return of the *Dedimus*, 70, 96

It is not error in a common recovery, although it doth not appear that there was not any warrant of attorney for appearance, *Pages* 70, 96

Error of a judgment in an inferior court, 75

Vide jurisdiction.

The plaintiff obtains a judgment against his own ejector, and the party concerned in the land, brings a writ of error in the name of the feigned defendant. The plaintiff pleads to the writ of error, the release of the defendant, and the court held that such release shall not be allowed, 93

And in the said case, the court will not permit the party to proceed to try the issue, if the release be good or not, because it is to bar the right of a third person, *ibid.*

A writ of error to reverse a judgment given in *C. B.* in a writ of partition, upon a *Nihil dicit*, of divers manors, and view of frankpledge, free-warren, and other things of value, and on *In nullo est Erratum* pleaded, divers errors assigned, some in form and others in substance of the proceedings, but not determined, 172

A writ of error lies to *Berwick* or *Calais*, 174

Error of a judgment in the court of *Common Pleas* assigned, That on a *Relicta verificatione* a *Misericordia* was entered, whereas it ought to have been a *Capiatur*, 195

Error to reverse a judgment given in *Bristol*, in an action of debt on obligation. The defendant pleads *Non est factum*, and after *Relicta verificatione* confessed, the action and the judgment thereupon was, *Quod defendens sit in Misericordia*, and the error assigned, that it ought to be a *Capiatur*, *Quære*, for it is not resolved, *Page* 202

Error of a judgment in *Hexam*, for that the *Venire* is ill awarded, for that it is *Præceptum est per Senescalhum Curiæ prædict. quod venire fac. duodecim tam de vicineto de Hexam quam de Vicineto de* Fallowfield *infra Jurisdictionem, &c. quia nec, &c. Quod sint hic ad horam secundam post meridiem hujus diei*, 218

1. It is not *Per Curiam nec per Senescallum in Cur'*, and it may be it was out of court, and process in private jurisdictions shall not be taken by intendment; and of this opinion were two justices, *contra Hale.*
2. The manor of *Fallowfield* is not laid to be within the jurisdiction, as it ought to be in the pleading of the prescription, and the saying in the awarding of the *Venire* that it is so, is not sufficient; to which the whole court agreed.
3. The *Quia nec* for *Qui nec* is not good, but they ought to have put it in at large, and not as it is in *B. R.* and the *Quia nec* is nonsense, and this was allowed for error by two justices, *contra Hale*, but on consideration of the whole judgment was reversed, *ibid.*

Trespass against four in this court, who appeared, and judgment against them, and they bring error here of a judgment given *coram vobis*, and assign for error,

That one of the defendants being an infant appeared by attorney, whereas it ought to have been by guardian, *Et hoc parati sunt verificare, prout Curia consideraverit*, whereas they ought to have concluded to the country; *sed non allocatur*, *Page* 218

Debt on a bond, judgment was had by default by the plaintiff as executor, and the attorney had left out, *Et profert hic in Cur. Literas Testamentarias*, but yet the plaintiff was called executor in the count, and the defendant having brought error, it was moved to have the record amended, but denied, 223

When error in fact is well assigned for error, *In nullo est erratum* amounts to a confession of the fact; as if infancy be assigned, the plaintiff cannot plead *In nullo est erratum*, because by it he confesseth the infancy, but he ought to take issue; but if the party assign for error that the court did not sit, or that the defendant did not appear, which assignments are matters of fact, but not well made, there *In nullo est erratum* amounts to a demurrer, 231

Error brought for joining *Assumpsit* and trover in one declaration, 233

Error of a judgment in *Newcastle* in dower, for that it was by plaint there, and the error assigned here was, that freehold is not pleadable without original writ, adjourned, *ibid.*

In *debt* for 300*l.* the plaintiff obtained judgment by *Nihil dicit* five years ago, and the defendant brings error in *B. R.* and assigns for error no original, and on a *Certiorari* the *Custos Brevium* returns no original; after the plaintiff procures an original, and on enquiry the Master of the Rolls ordered that writ to be set aside. But it was ruled to stand, for that the Master of the Rolls had no authority here, and that if the *Custos Brevium* takes it off the file, he forfeits his office. *P.* 244

A writ of error lies on the statute of 27 *Eliz. cap.* 8. of a judgment given in *B. R.* in debt on the statute of 1 *Eliz. cap.* 3, *&c.* for absenting from church, *&c.* 275

Judgment on an indictment in trespass reversed for error, for that the first process was a *Capias*, whereas in all indictments for trespass and under treason, a *Venire Facias* is the first process, 375

T. & S. & al. were convicted of a riot in the county of *D.* upon the view of two justices of the peace, and the sheriff of the said county, *contra formam Statuti* 13 *Hen.* 4. *cap.* 7. and fined by the justices, but the sheriff did not join in setting the fine: and on error brought judgment was reversed, for that the sheriff did not join in fining them, 386

In an attachment on a prohibition where damages are given for the plaintiff, if a *Visne* be not laid where the suit in the ecclesiastical court was, it is error, 387, 388

If there be a *Misericordia* entered against the plaintiff, where part of the verdict that is found for the defendant is surplusage, this is error, 390

In an *Indebitatus Assumpsit* in an inferior court, the court was said to

to be held *coram Majore & Burgenſibus Burgi prædict. ſecundum conſuetudinum ejuſdem Burgi, &c.* and the name of the mayor is not mentioned, and the judgment reverſed therefore, *P.* 395

Error brought of a judgment in ejectment upon a variance betwixt the verdict and judgment, but left undetermined, 398

Error in *Boſton* to reverſe a judgment given there upon a *Scire fac.* grounded upon a recognizance for bail; the court there did certify not only the judgment upon the *Scire fac.* but alſo the principal judgment and all proceedings therein, and reſolved good enough, 431

Proceedings in inferior courts are never entered at large, unleſs when a writ of error is brought, and they make up an intire record, and not otherwiſe, 20, 21, 431

A writ of error doth not lie upon a conviction upon the ſtatute of 3 *Jac. cap.* 4. for not coming to church, for that it is no judgment, but the party's remedy; if it be erroneous in the Exchequer to quaſh it there, 433, 434

Error of judgment in the grand ſeſſions of *Brecon* in dower, and divers errors aſſigned 459

In a writ of error to reverſe a fine the defendant cannot plead the ſame fine (now endeavoured to be reverſed) in bar to the writ of error, 461, 462

In trover by five, before verdict one of them dies, and they proceed to trial, and verdict for the plaintiffs, then the plaintiffs ſuggeſt that one of them is dead, and pray judgment for the reſt, and had it; and on error brought and aſſigned that the party died before verdict, and ſo a verdict given for a dead perſon; judgment reverſed, *Page* 463

ESTOPPEL.

One ſhall not be eſtopped but of that which he may have a traverſe, 458, 459

EVIDENCE, vide *TREASON.*

The wife cannot be admitted to give evidence againſt her huſband, nor the huſband againſt the wife in any caſe, excepting treaſon, 1

One indicted of perjury in the time of *Cromwell*, and verdict againſt him, but by the death of *Cromwell* no judgment is entered, is now a good witneſs, 32

An almanack wherein the father had writ the nativity of his ſon, allowed as good evidence to prove the nonage of the ſon, 84

In an information of perjury, to prove the perjury one was produced to what one, ſince dead, ſwore upon the firſt trial, and allowed good evidence, 170

Upon an information on the ſtatute of uſury, he who borrows the money may be a witneſs after he hath paid the money, but not before, 191

Depoſitions taken in *Chancery in perpetuam rei memoriam* on a bill for that purpoſe exhibited, cannot be given in evidence at a trial at law, unleſs there be an anſwer put in and produced, 335, 336

If a man be convicted of felony, and after pardoned, it ſeems he may

may be a good witneſs, by three juſtices, *Page* 369
A man convicted of felony and burned in the hand may be a good witneſs, for that the burning in the hand is *quaſi* a ſtatute pardon, 380
But in the ſaid caſe if he had not been burned in the hand, a pardon would not have reſtored him to his credit again, for that in his teſtimony the people are concerned, and conſequently the pardon cannot deprive them of their intereſt; *Quære*, *ibid.*
Nothing can be given in evidence againſt the probate of a will, but forgery of it, or its being obtained by ſurpriſe, 405
Though evidence be concluſive, yet the jury may hazard an attaint if they pleaſe, *ibid.*
Whereſoever the ſame evidence will maintain either an action of trover or treſpaſs, there the recovery and judgment in one of the ſaid actions may be pleaded in bar againſt the other; *vid. TROVER* and *BAR.* 472
Whereſoever it may be preſumed that any thing muſt of neceſſity be given in evidence, the want of mentioning of it in the record will not vitiate it after verdict; *vid. VERDICT.* 487
Why two witneſſes are required in treaſon, *vid. TREASON.* 408

EXCHEQUER.

If goods be condemned by this court, and proclaimed as forfeited, the property is altered, ſo as no action of treſpaſs or trover will lie by the proprietor againſt the perſon that ſeiſeth them, 336
The king may diſpoſe of the land itſelf of a perſon outlawed by the courſe of the Exchequer, *Page* 17

EXECUTION.

One committed to the *Marſhalſea*, for divers miſdemeanors is taken in execution, he ſhall not be ſet at large, 58
When a man is in priſon for criminal matters, he is not chargeable with a civil action without leave of the court, 58
But if he happen to be charged, he ſhall not be diſcharged. *Fieri non debuit, ſed factum valet*, *ibid.*

EXECUTORS.

Debt lies for fifths againſt an executor upon the ſtatute of miniſters, for it was a duty in the teſtator, 57
But eſcape lies not againſt the executor, for that action is founded *ex delicto*, *ibid.*
Debt lies for an executor for not ſetting out of tithes, on the ſtatute of 2 *E.* 6. *ibid.*
Executor is not chargeable for a perſonal tort of the teſtator, 71, 72
Though the executor be not chargeable for a miſfeaſance, yet for a non-feaſance it ſeems he is chargeable, *ibid.*
As non-payment of money levied upon a *Fieri facias*, he is chargeable, 72
Suit in the eccleſiaſtical court lies againſt an executor for tithes not paid by the teſtator. *In Margin.* 72, 95
A. makes his will, and therein makes *C.* and *D.* his executors; *D.* makes

D. makes his will and executors, and dies; *G.* dies inteſtate, his adminiſtrator ſues the executors of *D.* for a legacy due from *A.* in the ſpiritual court, and a prohibition denied, by three juſtices, *contra Keiling*, *Page* 123

In an *Indebitatus Aſſumpſit* by five executors for monies received to the teſtator's uſe, the defendant pleads in abatement, that two of the plaintiffs are under the age of ſeventeen years, the plaintiff demurs, and whether the three that were of full age, and the infants ought to join in this action was the *Quære*; not reſolved, 198

In a *Scire facias* brought by *M.* and one other to have execution of a judgment in debt, the plaintiff ſets forth in the writ of *Scire facias* that the teſtator made the plaintiff and another his executors, that the other is under the age of ſeventeen years, and the defendant demurred on the writ; but reſolved the writ was good, and that the infant ought not to join, 198

An executor cannot retain to ſatisfy a bond to himſelf againſt a judgment entered after the teſtator's death, on a verdict in his lifetime, for that the ſtatute of 17 *Car.* 2. *cap.* 8. doth ſupply the death of the defendant ſo as to make the judgment good againſt the executor's debt, 210

In a *Scire fac.* on a judgment in debt againſt an executor, the defendant pleads *pleinment adminiſter*, and on demurrer had leave given him to mend his plea, 230, 231

In the time of *Glyn* chief juſtice this plea was adjudged naught. *In margine*, *Pages* 230, 231.

If the teſtator bind himſelf to pay money at a day to come, and he dies before, his executor is bound to perform it; otherwiſe if it be to do a collateral act, as to make a feoffment, or the like, before ſuch a day, and he dies before, the executor is not bound, 415, 416

Where the teſtator is obliged by bond to pay a ſum of money, in an action againſt his executor, he ought to plead *Uncore priſt*, 416

Though the ſtatute of 21 *Hen.* 8. *cap.* 5. ſays that the executor ſhall bring in a true and perfect inventory, and the executor ſwear ſo to do, yet the ordinary, as he may diſpenſe with the time of bringing it in, ſo he may diſpenſe with the inventory itſelf upon cauſe ſhewn, 470, 471

As if a legacy be given to *A.* to be paid at three ſeveral payments, and the executor pays two of them, and takes releaſes, and offers to pay the third, and the legatee refuſes to accept it, but cites him before the judge in the ſpiritual court, in ſuch caſe the ordinary may diſpenſe with the bringing in any inventory at all; for the intention of the ſtatute was for the advantage of legatees and creditors; and here the legacy is tendered, and no creditor complains; *ergo*, 470, 471

An inventory by the ſaid ſtatute is only to conſiſt of goods, chattels, wares and merchandizes, and not of things in action, *ibid.*

FALSE IMPRISONMENT.

THE ſheriff not having any writ makes a warrant to arreſt *J. S.* and the bailiffs arreſt him accordingly, and after a writ is purchaſed bearing *Teſte* before; adjudged falſe impriſonment lies againſt the bailiffs; for although a writ ſhall relate to the *Teſte* to maintain juſtice, yet it ſhall not relate to excuſe and ſupport a wrong; for the time of the purchaſing of it may be ſhewn by ſpecial pleading *P.* 161

In treſpaſs of falſe impriſonment, the defendant juſtifies by virtue of an arreſt in obedience to a precept out of *Warwick* court, returnable *ad proximam Curiam*, and on demurrer it was ſaid the proceſs ought to be returnable on a day certain, and not *ad proximam Curiam*, for ſo the court being not held, the party may be perpetually impriſoned; but adjourned, 205

In treſpaſs and falſe impriſonment, the caſe was, a writ iſſued out of the court of *C. B.* at the ſuit of *J. S.* directed to the ſheriff of *Norfolk*, who makes his warrant to the bailiff of the liberty of *Aliſkum*, who made his warrant to his deputies to arreſt the plaintiff; according to the command of the writ the deputies arreſt him at *W.* out of the liberty, and after bring him within the liberty, and deliver him to the defendant, gaoler of the ſaid liberty. And the queſtion in *C. B.* was if this action lies againſt the defendant gaoler, who was not privy or conuſant of the ſaid wrongful arreſt or taking, but only detained the priſoner, being delivered to him as arreſted upon the ſaid writ and warrant. And judgment was given in *C. B.* for the plaintiff; and on a writ of error brought in *B. R. Raymond* juſtice conceived the judgment ought to be affirmed; but the other juſtices reverſed the ſaid judgment, *Pages* 421, 422, 467, 468, *&c.*

FINES and *FORFEITURES.*

If a man be convicted upon verdict on an information or indictment, his fine ought to be ſet in open court, and not privately in the judge's chamber, 68

One *Pain* convicted of perjury on an information at common law, was ſentenced to ſtand on the pillory two days, and to be impriſoned a month without bail or mainpriſe, and fined 100*l.* 81

One *Farr* was indicted at common law for forging of a warrant of attorney, and found againſt him, and ſentenced to ſtand twice on the pillory with a paper, and pay 100 marks, and to be impriſoned during the pleaſure of the court, *ibid.*

A jury fined for giving their verdict contrary to the direction of the court of the ſeſſions upon an indictment, 98, 138

On an information found againſt the keeper of the *Gatehouſe* priſon at *Weſtminſter*, for extortion of fees and hard uſage of priſoners; ſhe was fined 100 marks, removed from her office, and the cuſtody of the priſon delivered to the ſheriff of *Middleſex*, 216

On an information againſt a captain of

of the foot-guards and his ſerjeant for reſcuing one of his ſoldiers of his company from the cuſtody of the ſheriff of *London*, he confeſſed the fact, and on that judgment was given againſt them, the captain was fined 100 *l.* and the ſerjeant 50 *l.* and impriſonment till they paid the ſame, *Page* 231

Though it be ſaid that fines aſſeſſed in court by judgment upon an information cannot be afterwards qualified or mitigated, it is to be meant in another term, and not in the ſame term. *In margine*, 377

Mr. *Redding* having been convicted (before the juſtices of *Oyer* and *Terminer*) for endeavouring to perſuade *B.* who was a witneſs againſt the noblemen in priſon in the *tower*, to forbear his proſecution of them, was adjudged to ſtand on the pillory and fined 100 *l.* and impriſoned for the ſame, and his gown pulled over his ears, 376, 377

The ſheriff ought to join with the juſtices of peace in ſetting a fine on rioters by the ſtatute of 13 *Hen.* 4. *cap.* 7. 386

In an information found againſt *Blood* and *Chriſtian*, and others, for conſpiring to indict the duke of *B.* of buggery, judgment was given that *Chriſtian* ſhould ſtand in the pillory an hour, and pay 100 marks, and lie in priſon till paid, *&c.* 418

In an information found for ſpiriting away a boy againſt *D.* for which he was fined 500 *l.* and impriſoned till he paid it, 474

FINES of *LAND*, vide *TAIL* and *ERROR*.

Tenant in tail, the remainder in tail, doth levy a fine, and tenant in tail dies without iſſue, he in remainder is bound to enter within five years after the death of tenant in tail elſe he is barred, *Page* 151

Tenant for ninety-nine years, if he lived ſo long, levies a fine and dies, he in reverſion ſhall have five years after his death, and the court held there is no difference between the leſſee for life and leſſee for years, as to this point, contrary to the opinion of the lord *Coke* in *Podger*'s caſe, 219

The iſſue in tail was barred by a fine by virtue of the ſtatute of 4 *Hen.* 7. *cap.* 24. before the ſtatute of 32 *Hen.* 8. *cap.* 36. 359

In a writ of error to reverſe a fine the defendant cannot plead the ſame fine (now endeavoured to be reverſed) in bar to the writ of error, 461, 464

Where it is ſaid in *Co.* 2 *Inſt.* that a fine of lands in the *C. B.* in ancient demeſne is a bar after five years, it is to be intended of another fine, and not the ſame which was firſt levied, 462

In a writ of error brought by a remainder man to reverſe a fine levied by tenant in tail, the plaintiff aſſigns for error, that the tenant in tail after the acknowledgment before the commiſſioners, and before the return of the writ of covenant, died it is error, 462

FORCIBLE ENTRY, vide *INDICTMENT*.

Poſſeſſion without title is a good plea in a forcible entry to bar reſtitution, although on demurrer, *Pages* 84, 85

On an indictment of forcible entry to ſay he entered as ſervant, without ſaying by whoſe command, is good enough, *ibid.*

In bar to reſtitution on a forcible entry, the defendant ought to plead, that he was in poſſeſſion three years before the inquiſition found, 85

GAVELKIND.

IF gavelkind land be deviſable by cuſtom of gavelkind? 59, 76

Lands diſgavelled by act of parliament, yet the cuſtom of deviſing is not thereby taken away, *ibid.*

Gavelkind may be pleaded generally, otherwiſe of particular cuſtoms, as dower of a moiety, *&c.* 59, 60

If the king purchaſe gavelkind land, the cuſtom of the deſcent is ſuſpended; by *Twiſden* juſtice, 77

GRANTS BY THE KING, vide *PATENTS.*

The king makes a leaſe for years, provided on non-payment of the rent, the leaſe ſhall be void, the rent is behind, the king cannot grant this term *de novo*, without finding by office that the rent was unpaid at the day, by the ſtatute of 21 *Jac. cap.* 25. 137

The king ſeiſed in fee of the manor of *Holbeck in Com. Lincoln*, grants it with appurtenances; and alſo *omnia fundum, ſolum, arenas Mareſcales, & omnes alias terras quæ modo inundat. exiſtunt, & quæ fuerint impoſterum recuperat. de mari*, with a *Non obſtante* the miſrecital, *&c.* The lands in queſtion were under the ſalt water at the time of making the patent, and were ſince recovered from the ſea; and the ſole *quære* was, if theſe lands improved and recovered from the ſea paſs by the ſaid grant? the caſe was adjourned, *Pages* 241, 242

If the king grant part of the ſea, it being parcel of the prerogative, it ought to be expreſsly named, *ibid.*

Every grant of the king ought to comprehend certainty, and therefore if the king grant his demeſnes, that doth not comprehend copyholds, otherwiſe in caſe of a common perſon, 241

If the king grants lands when they ſhall eſcheat, it is a void grant, for if it ſhould be good it ſhould be of a freehold to commence *in futuro*, which the law will not permit, 241, 242

If the king grants *bona felonum*, *&c.* that will not paſs the goods of one that ſtands mute, and will not plead, *ibid.*

If the king grants the amerciaments of his tenants, that will not paſs the amerciaments of them by the king as commiſſioners of ſewers, 242.

If the king grant to divers perſons to be exempt from juries, they ſhall not be exempt from ſerving in *B. R.* without expreſs words, 113, 114

All

All Hundreds that were granted in fee by the crown before the time of *Edw.* 3. are joined to the office of the ſheriff, *Pages* 361, 362, *&c.*

In the year 1661, the king grants power to the lord *W.* governor of *Jamaica* to make laws there, who called an aſſembly, and thereby made laws for raiſing a public revenue by a tax on ſtrong liquors, towards the upholding the government there, which laws are indefinite and perpetual; afterwards the king grants power to the ſaid lord *Vaughan* to chuſe his own council, and with the conſent of the major part of them to frame general aſſemblies of freeholders, according to the uſage of other plantations, and with their conſent to make laws ſuitable to thoſe of *England*, which ſhould remain in force for the ſpace of two years and no longer, unleſs approved by his majeſty; the ſaid aſſembly granted the like revenue of ſtrong liquors, but to continue but two years. The queſtion from hence aroſe (which was referred by the privy council to the judges,) whether the law made by the aſſembly in the lord *Vaughan*'s time had totally laid aſide the law made in the lord *W.*'s time by implication? and it was reſolved, that the laſt council having power to make laws to continue but two years, did not repeal the perpetual law made before, but did only ſuſpend its power during the two years, and no longer, 397

The king within age may grant duchy lands, 90

GRANT.

A prebendary having power to make a commiſſary, cannot grant this power to his leſſee, *Page* 88

None can take a preſent eſtate except they be parties to the indenture, but by way of remainder they may, though no parties, 150, 151

If leſſee for years grants ſo much of his term as ſhall be to come at the time of his death, it is a void grant, 27

If one joint-tenant grant to another, this will amount to a releaſe, 187

If the reverſion of a term for years be granted for a valuable conſideration, it doth not paſs by the ſtatute of uſes, for that there is no perſon to ſtand ſeiſed to the uſe, 487

HOMINE REPLEGIANDO.

ONE *Deſigny* a merchant trading to *Jamaica* ſpirited away the eldeſt ſon of one *Turbet*; whereupon his father exhibited an information againſt him; and on not guilty pleaded, was found guilty, and fined 500 *l.* and to lie in priſon till he paid his fine; but the priſoner having the promiſe of a pardon, and the court having notice of it (it being an offence of a heinous nature) directed the father to bring a *homine replegiando*, and thereupon an *elongatus* was returned, and the priſoner charged with it in priſon. 1. And the firſt queſtion was, whether the priſoner was bailable

bailable on the *Withernam?* and resolved by all the court, unless the defendant will confess the the taking and having the party in custody, he cannot be bailed in that case, *Page* 474

2. If an *elongatus* returned by the sheriff be conclusive to the defendant, so as he may not traverse it? 1. And they held the defendant, if the return be false, may bring an action upon the case against the sheriff, and if it be found for the plaintiff, the defendant in the *homine replegiando* may be be bailed, 474, 475

2. If the sheriff shall die before the issue tried, or the action brought, then the king may issue out a commission to inquire of the truth of the return, which inquisition taken by virtue of the said commission may be traversed by the defendant in the *homine replegiando*; and if the issue of that traverse be found for him, he shall be bailed, 474, 475

A *Capias* in *Withernam* is no execution, *ibid.*

IMPARLANCE.

A PLEA to the jurisdiction cannot be pleaded after imparlance, 34

INDICTMENTS, vide *FORCIBLE ENTRY*, *FINES*, *FORFEITURES* and *STATUTES.*

Indictment of a forcible entry for entering into a copyhold, and that the defendant *ejecit & disseisivit* the party, quashed, 67

Upon an indictment on the statute of 2 & 3 *Philip and Mary*, *cap.* 8. for not contributing to the repair of highways, *contra formam statuti*, resolved, if a man have eight plough-lands he ought to find eight carts for six days, although his land be pasture, *P.* 186

On a breach of a recognizance for the good behaviour, an indictment lieth not, but a *scire fac.* on the recognizance, 196

An indictment for refusing the oath of allegiance on the statute of 3 *Jac. cap.* 4. 212, 374

An indictment for murder, 212

Upon an indictment for stopping a way, it was declared to be the course of the court, that the offender is to be admitted unto a fine upon his submission before verdict, if there be a certificate that the way is repaired; but if the party be convicted by verdict, such certificate will not serve, but the party ought to cause a *Constat* to issue out to the sheriff, who ought to return, that the way is repaired, because the verdict, which is a record, ought to be answered with matter of record, 215

Indictment for refusing the oath of obedience upon the statute of 3 *Jac. cap.* 4. and judgment thereupon, and a writ of error brought, and divers errors assigned; and judgment reversed for misreciting the oath contained in the act, 373, 374

Indictment against *P.* for entering into the close of one *Crew*, who was found guilty, and judgment, and fined 12*d.* and error assigned, because the process was a *Capias*, whereas in all indictments for trespass

treſpaſs and under felony, a *Venire fac.* is the firſt proceſs; and judgment was reverſed, *P.* 375

Indictment at the quarter-ſeſſions for ſhooting with a gun, not having lands or tenements, &c. of the annual value of 100*l.* and judgment againſt him, and error brought thereupon, and judgment reverſed, 378

Indictment againſt a popiſh prieſt on the ſtatute of 27 *Eliz. cap.* 2. and a ſpecial verdict thereupon, and judgment for the defendant, 377

The earl of *Caſtlemain* indicted for traiterouſly intending to kill the king, to introduce popery, and to ſubvert the government, &c. 379

Indictment for uſing the trade of a ſaleſman not being apprentice, &c. according to the ſtatute of 5 *Eliz.* and reſolved to be a trade within the ſtatute of 5 *Eliz.* 385

Indictment upon the 3 *Jac. cap.* 4. for not coming to church, with divers exceptions taken to it, 433, 434

INFORMATION, vide *PERJURY*, *FINES* and *FORFEITURES*.

Exceptions to the form of pleading in an information for perjury, 34, 35

Information againſt one uttering braſs halfpence, 185

An information upon the ſtat. of 14 *Car.* 2. *cap.* 5. againſt the defendant, being a worſted weaver, for retaining above two apprentices, contrary to the form of that ſtatute, 191

There is a difference when the information and action is grounded upon an act of parliament, and the concluſion is, *contra formam Statuti præd.* there the information is not good, if the ſtatute be miſrecited; but if the concluſion be *contra formam Statuti in hujuſmodi caſu editi & proviſi*, there it may be good notwithſtanding the miſrecital; by *Twiſden* juſtice, *Page* 192

Information, for that the defendant did outrageouſly make diſtreſſes upon his tenants, and was a perturber of the peace, and a common oppreſſor; held the information is too general, and lies not for diſtreſſes, for that they are private offences, 193, 205

Information againſt one as common barretor, is good, without other circumſtance; but as *oppreſſor multorum hominum*, without ſaying whom, is not good, 205

Information on 12 *Car.* 2. *cap.* 13. for taking exceſſive uſury, 196

Vide Uſury.

Information for writing a ſcandalous letter, 201

In an information of perjury at the aſſizes, it was reſolved, that the jury cannot have cognizance of any variance between the record and information, but the judge there ought to determine it, and becauſe the jury had found it ſpecially, it was ordered that a *Venire facias de novo* ought to iſſue, 202

Information againſt the keeper of the priſon of the gate-houſe for extortion of fees, and hard uſage of the priſoners in a moſt barbarous manner, 216

Information brought in this court againſt a carrier putting in above five

five horſes in his waggon, contrary to the ſtat. of 22 *Car.* 2. if it lies, *quære*, *Page* 214
Information againſt a captain in the foot-guards and his ſerjeant, for reſcuing one of his ſoldiers of his company from the cuſtody of the ſheriffs of *London*, 231
Information for not repairing a certain common ſtone-bridge, and divers exceptions taken to it, 384
Information againſt *Blood* and *Chriſtian*, and others, for conſpiring to indict the duke of *B.* of buggery, 417
Information againſt a merchant for ſpiriting away a boy, 474
Information againſt *Ford*, lord *Grey* and others, for taking away the lady *Henrietta Berkley*, 473

INVENTORY, vide *EXECUTORS.*

JOINTENANTS, vide *JUDGMENT.*

Judgment in debt is had againſt two, the one dies, and the plaintiff brings a *Scire facias* againſt the ſurvivor, and prays execution againſt the ſurvivor, which was granted by the court, 26
If a judgment be had againſt two, and the one dies, the charge ſurvives, becauſe the plaintiff may take a *Fieri fac.* if he will, and diſcharge the land, 27
But if upon this *Scire fac.* the plaintiff takes an *Elegit*, the defendant may have an *Audita querela*, or elſe ſuggeſt this matter on the return of the *Elegit*, and have a *Superſedeas*, *ibid.*
In judgment againſt two, if one dies, if the plaintiff will ſue execution upon the lands by *Elegit*, he ought to charge the ſurvivor and the heir of the deceaſed jointly, *Page* 27
In debt, the defendant pleaded a joint judgment againſt the teſtator and one *H.* now alive, and that he had not aſſets beyond that judgment to ſatisfy; and adjudged on demurrer for the plaintiff, becauſe the lien ſurvives, and the executor not liable, 153
If one jointenant grants to another, this will amount to a releaſe, 187
If lands be given to two upon condition that they ſhall not alien, and one releaſes to the other, it is no breach of the condition, 413, 414

ISSUE, vide *TRYAL.*

The ſtatute of 32 *Hen.* 8. *cap.* 30. helps misjoining of iſſues, 458
In debt on a bond againſt *G. Spat* as executor of *J. S.* the defendant pleads it is not his deed, the jury find it is the deed of *Spat*, as the plaintiff declared; and in error the judgment affirmed, becauſe there was an affirmative and a negative, and by the jury's finding the plaintiff had cauſe of action, 458
If the bar be good, and the replication naught, and iſſue be taken upon it, they ſhall replead to the replication, and the bar remains; and ſo if the bar be good, and the replication be good, and the rejoinder naught, and iſſue taken upon it, they ſhall replead to the rejoinder, and the bar and replication remain; but if the bar is naught, and the replication good, and iſſue taken upon it,

it, they ſhall replead for the whole anew, becauſe the bar was naught, *Page* 458

JUDGMENT, vide *JOINTENANTS*.

Judgment given by default upon a *Scire fac.* returned againſt one not ſubject to the firſt judgment, ſhall bind him, 19

If judgment be given againſt the bail upon two *Nichils*, and no *Capias* is returned againſt the principal, although the bail cannot reverſe the judgment, yet he may have an *Audita querela*, but not on a *Scire fac.* returned, *ibid.*

Debt lies upon a judgment as well after a writ of error as before, 100

If iſſue be taken upon a dilatory, *&c.* and found againſt the demandant, final and peremptory judgment ſhall be given; otherwiſe it is upon a demurrer, 118, 119

Judgment arreſted for the uncertainty of the verdict, 200

Treſpaſs *vi & armis* for taking the mare *ipſius querentis*, *necnon bona & catalla ſequent. viz.* and ſums them up, but doth not ſay that they were the goods *ipſius querentis*, and on demurrer reſolved, the plaintiff might have judgment for the mare, and releaſe the action for the reſidue, 395

Ejectment for 100 acres of bog and other things; the plaintiff releaſed his demand (to the other things) and took judgment for the reſidue, *ibid.*

JURORS and JURIES, vide *CHALLENGE*.

Although a jury be charged and ſworn in the caſe of a plea of the crown, yet a juror may be drawn, or the jury diſmiſſed, notwithſtanding, *Page* 84

A jury fined for giving their verdict, contrary to the directions of the court of the ſeſſions, upon an indictment, 98, 138

If the king grant to divers perſons to be exempt from juries, they ſhall not be exempt from ſerving in *B. R.* without expreſs words, 113, 114

In caſe of ſuch exemption, the parties ought to come in perſon, for the ſheriff is not bound to return it, *ibid.*

If a man be attainted of felony, and pardoned, he ſhall not afterwards be ſworn upon a jury, 380

JURISDICTION, vide *ERROR*.

In an *Aſſumpſit*, the plaintiff declares, That the defendant was indebted to the plaintiff, within the juriſdiction, for nurſing a child, and for error alledged, that it is not ſet forth that the nurſing was within the juriſdiction, *Quære*, 75

Particular juriſdictions are not to be ſupported by implication and intendment, *ibid.*

JUSTICES of PEACE.

Upon a *Certiorari* brought to remove an order of ſeſſions into this court, upon opening of it, the court were all of opinion, that

that justices of peace have nothing to do with contracts, and that the order that they had made therein, was void in law, *Page* 433

By the statute of 13 *Hen.* 4. *cap.* 7. the justices of peace cannot impose a fine upon rioters, without the sheriff join in it, 386

One *F.* a widow, having several children, and living in the parish of *St. Bodolph's without Aldgate*, which parish lies in two counties, *viz. London* and *Middlesex*, put out her children to nurse at *Enfield* in *Middlesex*; then the mother died in that part which lies in *Middlesex*. The nurse applies herself for monies to the parish of *St. Botolph*; and on application to the sessions, the justices ordered, that that part of the parish in *London* should go equal charge with the other, 476, 477

But after, on application to the judges at the *Old Bailey*, it was ordered, that that part of the parish which lies in *Middlesex* should pay the nurse; for it being made appear, that each part of that parish had distinct officers, and made distinct rates, the court looked on each division as a several parish, *ibid.*

It was also resolved, that no notice can be here taken of the place of the birth of the children, but of their last settlement, because only poor children, and not vagabonds; but those that are rogues and vagabonds by the statute of 3 *Eliz. cap.* 4. shall be provided for by the place where they were born, 477

LATIN.

WHERE a latin word is insignificant, it does not vitiate a declaration, otherwise when it signifies another thing, there it is ill, *Page* 15

LEASE, vide *GRANT.*

A lease by tenant in tail *in præsenti*, without rendering any rent, is not void, but voidable; but it seems, that if the lease be made to commence after his death, that this is a void lease, 132, 133, 134

If tenant in tail make a lease *in præsenti*, and after convey over his estate by fine, the conusee in this case cannot avoid this lease; otherwise it seems when the tenant in tail makes a lease to commence at a day to come, there the conusee may avoid it, *ibid.*

If lands be anciently leased by a bishop, and after purchased by a predecessor bishop, for increase of his demesnes, and continues unleased for twenty years and more; if these lands can be now leased again, so as to bind the successor, by the statute of 32 *Hen.* 8. *cap.* 28. *quære*, and for that the court was divided no judgment was given, 165, 166, 167, &c.

Lessee for life makes a lease for years, lessee for years surrenders to the reversioner, rendering rent. Resolved it is a good reservation, for that it is a duty by way of contract, 222

In debt for rent on a lease for years, the

the defendant need not to alledge a tender, otherwiſe where there is a condition, the breach whereof is to be ſaved thereby, *Pages* 418, 419

LEET.

One preſented at the leet for digging cony-boroughs, and breaking the ſoil in the waſte, and moved to quaſh it, becauſe it is not *ad commune nocumentum*, and the preſentment was quaſhed, for a leet cannot amerce for things to the damage of the lord, 160

A cuſtom in a leet, that the inhabitants of *D.* uſed to ſend a conſtable to the ſaid leet, held good, 204

A man may be amerced in a court leet for not ſcouring a ditch in a highway, notwithſtanding of the ſtatute of 18 *Eliz. cap.* 9. which gives the forfeitures for highways to the ſurveyors of the highways, 250

In an avowry for an amerciament in a leet, it is not ſufficient to ſay *præſentatum fuit* at the leet, that the plaintiff did ſuch an act, but he muſt aver the thing, and not rely upon the preſentment, 337

LEGACY, vide *DEVISE.*

LONDON, vide *MANDAMUS.*

A cuſtom that every citizen and freeman of *London* might deviſe in mortmain, allowed good, 4

A cuſtom that every freeman may take an apprentice, and that infants may bind themſelves to ſerve, &c. good, *ibid.*

Their cuſtom concerning orphans pleaded, 116

If any takes away or eloins an orphan, the court may commit the eloinor to priſon till he diſcovers where the eloinee is, *Page* 116

A by-law, that there ſhall be but ſo many cars in *London*, is good, 324, 328

But if ſuch a by-law, that no carman within the city, ſhall go with his cart without a licence of the guardians of ſuch an hoſpital, nor without paying a rent to ſuch an hoſpital for the ſame, and if any do contrary that then he ſhall forfeit ſuch a penalty to the ſaid guardians of ſuch hoſpital, this is a void by-law, *ibid.*

A by-law, that every fellow of the company of *vintners* in *London*, who ſhould be elected into the place and office of one of the livery, ſhould pay 31 *l.* 13 *s.* 4 *d.* is a good by-law; for it is to bind only the members of the corporation; and when a man will agree to be of a company, he doth thereby ſubmit himſelf to the laws thereof. And it is convenient that the company have ſuch power, to keep up their reputation, and the honour of the city, 446, 447

LIMITATION of *ACTIONS.*

If words are actionable at the firſt, the damages after do not give cauſe of action, and therefore the ſtatute of limitations of two years in ſuch cauſe is a good bar, 61

But where the words at the time of the ſpeaking are not actionable, but by reaſon of them the party after loſes his preferment, in ſuch caſe the ſtatute of limitation

of two years is not any bar implied, *Page* 61
Adjudged that a debt for damages clear, is within the ſtatute of the 21 *Jac.* of limitations, for that it riſes out of the action, and is not grounded on the record. *ibid.*

MANDAMUS.

LIES to reſtore one to the ſtewardſhip of a court leet, *Page* 12
But whether to a court baron, *dubitatur*, *ibid.*
A *Mandamus* lieth not here to reſtore a fellow of a college where a ſpecial viſitor is appointed by the founder, 31
If a *Mandamus* lieth to reſtore an attorney of the town court of *Canterbury*, *quære*, for the court was divided, 56, 57
A *Mandamus* lieth to make an apprentice free after he hath ſerved his time, 69
If on ſuch *Mandamus* it be returned, that he obliged himſelf by his indenture of apprenticeſhip, not to contract matrimony during his apprenticeſhip, and that he within the firſt two years thereof did marry, this is only a breach of covenant, but not any cauſe to bar him of his freedom, 92
A *Mandamus* lieth not for one that hath ſtudied the law ſeven years to call him to the bar, for that there is no perſon to whom the writ ſhould be directed, 69
The king gives licence to his queen to erect a college, *ad ſtudendum & orandum*, and no viſitor is appointed, if there lie any remedy in this court to redreſs any grievances ariſing within the ſaid college, *dubitatur*, *P.* 101, 102, 103
A *Mandamus* granted to reſtore the recorder of *Barnſtaple*, directed to the mayor of the corporation, who returned *Quod non conſtat nobis*, that he was ever elected, and the return adjudged inſufficient, and reſtitution awarded, 153
A *Mandamus* lieth not to reſtore a town-clerk, for that he is removable at the will and pleaſure of the corporation, 188
A *Mandamus* lies to reſtore the *Sexton* of a pariſh church, 211
A *Mandamus* lies to the mayor and aldermen of *London*, to make them enter up a judgment, 214
A *Mandamus* lies to the judge of the prerogative, to command him to prove a will, the will being not then controverted, but the ſuggeſtion for the *Mandamus* was brought into court, and read before the *Mandamus* granted, 235, 236
Returns to *Mandamus's* ought to be certain, and not by implication, becauſe the party ouſted hath not liberty to reply to them, 365
If this court ſuſpect a return to be falſe, they can make a corporation ſwear the return, 365, 366
A *Mandamus* lies to ſwear one into the office of mayor 431
The return to a *Mandamus* ought to be certain and direct, and not argumentative only, 431, 432
Upon a *Mandamus* directed to the mayor, aldermen, bailiffs and citizens of the city of *Carliſle*, to reſtore *H.* to the place and office of one of the aldermen of the ſaid city, it was reſolved, that where time

time out of mind a corporation had power to remove an alderman for reasonable cause, though they take a new charter, wherein there is no such power given the corporation to remove an alderman; yet the same power still remains, for that the charter doth not merge or extinguish any of the ancient privileges, but the corporation may use them as before, and such return was held good, *Page* 439

There being a dispute between the parson and the parishioners touching the election of churchwardens, the parson claiming to appoint one by virtue of the canon, and the parishioners claiming a custom to chuse both, a *Mandamus* was granted to Sir *Thomas Exton*, commissary to the dean and chapter of *St. Paul's*, to swear *Edward Carpenter*, he being thereto duly elected (who made a special return of the whole matter) because the ecclesiastical courts cannot try the custom of chusing the churchwardens, 439, 440

Taverner having been chosen into the livery of the company of vintners, had a *Mandamus* directed to the master, wardens, and assistants of the said company, to admit him to be a liveryman, according to the said election, 446, 447

Vide London.

NONSUIT.

ON a nonsuit upon a record of a *Nisi Prius* roll varying in substance from the plea roll, a *Distringas de novo* was awarded agreeing to the plea roll, *Page* 38

The plaintiff at the *Nisi Prius* was nonsuit, because the *Nisi Prius* was, that the plaintiff was in such a benefice in the year 1662, whereas the plea roll is 1626, and so the plaintiff destitute of his proof; it was moved to set the nonsuit aside, but adjourned, 73

NUSANCE.

Whether an inmate be a nusance at common law. *Quære.* 74

OATH of SUPREMACY, vide *STATUTES.*

BY the statute of 5 *Eliz. cap.* 1. it is enacted, that the lord chancellor or keeper of the great seal of *England* for the time being, shall and may at all times hereafter, by virtue of this act, without any further warrant, make and direct commission or commissions under the great seal of *England*, to any person or persons, giving them or some of them thereby authority to tender the oath of supremacy mentioned in the statute of 1 *Eliz. cap.* 1. to such person and persons, as by the aforesaid commission or commissions the said commissioners shall be authorized to tender the same unto. Whether a commission not directed to any person particularly, nor to tender the said oath to any person by name, be pursuant to the said act? 1st, and it was resolved by three justices

tices (*Raymond* juſtice doubting) that this commiſſion was very good, becauſe the power is left to the commiſſioners to chuſe whom they will tender the oath unto, by the clauſe of the act, and in this manner were the ancient commiſſions ſhortly after the ſtatute made, *Pages* 444, 445

2. Though the perſons refuſing to take the ſaid oath be neither officers nor miniſters mentioned in the ſeveral ſtatutes of the 1 and 5 *Eliz.* which impowers the lord chancellor to make out commiſſions; all perſons, though not officers, may be offered the ſaid oath, if the commiſſioners think fit, *ibid.*

By the aforeſaid ſtatute of 5 *Eliz.* it is farther enacted, that every perſon having authority to tender the ſaid oath, ſhall within forty days after the refuſal thereof, if then term-time, if not, then the firſt day of the next term, certify under his hand and ſeal, the name, place and degree of the perſon ſo refuſing, unto the *King's Bench*, in pain of 100 *l.* And the ſheriff of the county ſhall impanel a jury of the ſame county, to inquire of ſuch refuſal, which jury may upon evidence indict the party refuſing, *&c.* 1. If ſuch certificate is directed only to the judges by name, and not to the king in his court of *King's Bench*, as the act requires, be good? and reſolved by three juſtices (*Raymond* juſtice doubting) that it is good enough, becauſe it ſhall be intended that the ſaid judges made the court, and were therein ſitting at the time of the certificate, *ibid.*

If the indictment ſets forth a certificate from the commiſſioners under their hands, but not under their ſeals as the ſtatute requires, be good? but in regard the certificate in this caſe was found *in hæc verba*, in the verdict, to be under their ſeals, the court ordered it to be amended, *P.* 444, 445

OBLIGATION, vide *EXECUTOR.*

Conditions to perform covenants, one of which was, that the defendant was ſeiſed of an indefeaſible eſtate in fee-ſimple; the defendant pleads covenants performed; the plaintiff replies, That he was not ſeiſed of an indefeaſible eſtate in fee-ſimple. The defendant demurs generally, for that the plaintiff, as he ſuppoſed, ought to have ſhewn (he having all his writings) of what eſtate the defendant was ſeiſed; but adjudged the breach well aſſigned, 14, 15

If in a condition to perform covenants, the defendant pleads performance, and after rejoin, That the plaintiff ouſted him, it is a departure, 22

Debt on an obligation conditioned to pay 100*l.* on the 10th of *January* upon three months warning; the defendant pleads, That the plaintiff had not given three months warning; the plaintiff demurs. It ſeems that though the obligee omit the warning, the obligor ſhall be bound to pay it at any three months warning; *per Wyndham*, juſtice, 61

In debt upon a bond of 14*l.* the defendant demands oyer of the condition,

condition, which was, That if the defendant pay 2*s.* a week till 14*l.* be paid, and upon default of payment the obligation ſhall be void; the defendant pleads, That the 17th of *October* ſuch a year he made default, *Judgment ſi actio.* The plaintiff demurs; and judgment for the plaintiff, becauſe the condition being ſenſeleſs, the obligation is ſingle, and in force, *Page* 68

A condition to reſign upon requeſt is good, and not ſimoniacal, and judgment upon it affirmed in a writ of error, 175

In debt on a bond, the defendant pleads, That the ſaid writing was delivered as an eſcrow to *W.* a ſtranger, on condition that if the plaintiff ſhould procure a demiſe of certain lands to the defendant before ſuch a day; that the ſaid *W.* ſhould deliver the ſame *ut ſcriptum ſuum* to the plaintiff, otherwiſe not. The defendant pleads, That the plaintiff did not procure the ſaid demiſe, *Et ſic non eſt factum*; the plaintiff demurs, becauſe he anſwers not the deed, for *W.* never had authority to deliver his writing *ut factum*, but *ut ſcriptum ſuum*, which is not good, 197

Debt on an obligation by the plaintiff as ſheriff conditioned for the appearance of *W.* in *B. R. die Sabbati proximo poſt quindenam Sancti Martini ad reſpondendum Willielmo Gulſton in placito debiti.* The defendant pleads, That the ſaid *Gulſton* ſued forth a *Latitat* return' the ſame day againſt the ſaid *W. ad reſpondendum* the ſaid *Gulſton in placito tranſgreſſionis ac etiam debiti*, and pleads the ſtatute of 23 *Hen.* 6. And on demurrer held it was not the ſame writ mentioned in the condition, *Page* 220

A bond or covenant for the true impriſonment of *J. S.* if there be alſo a clauſe in it to pay chamber-rent, *&c.* it is a bond for eaſe and favour within the ſtatute of 8 *Hen.* 6. 222

An obligation *ſtare mandatis Eccleſiæ*, on excommunication, not good, 226, 227

A bond conditioned to perform a by-law hath been ruled naught, 227

A bond conditioned to ſeal and execute a releaſe to the plaintiff; the defendant is bound to do it without any tender; for the word *execute* and *ſeal* comprehends the making, 232

A bond conditioned to permit the plaintiff quietly to take and reap and carry away corn, if the defendant after forbid him to reap, it is a breach of the condition, 371

Where a condition of a bond is in the disjunctive, and one part is impoſſible, yet the other part ought to be performed, in caſe it be to be done by a ſtranger, 373

How intereſt ſhall be paid on a bond, 420, 421

If an action be brought upon a bond in *Middleſex*, and the bond itſelf is dated in *London*, it ſeems to be ill, for that it cannot be alledged to be made in any other place than where it bears date, 430

If a bond be made to *A.* to the uſe of *B.* conditioned to pay *B.* money, it is a good plea, that the obligor tendered the money to

to *B.* because he was in a manner privy to the obligation, *P.* 484

OFFICE and OFFICER.

Who may go into the office of the *Custos Brevium & Rotulorum in Banco Regis*, 53

PARDON, vide CORONE.

PARDON of murder, &c. shall not be allowed without a writ of allowance directed to the justices, 13

A pardon of killing and felony, &c. no pardon of murder, *ibid.*

The king cannot pardon the burning in the hand in an appeal, 370

If the principal be attainted of burglary, the accessary must answer, though the principal be pardoned, 477

PARLIAMENT.

Relative words in an act of parliament will make the thing to pass as well as if it had been particularly expressed in the act itself, 54, 55

A gift by parliament to the heir of *J. S.* who is a person attainted, is good, and must be intended such person as might have been his heir, being only a description of the person implied, 55

One taken by order of parliament after their prorogation shall be discharged, 120

Every session is a new parliament, *ibid.*

Judgment given in parliament may be executed by the Lord Chancellor, *Page* 120

In all cases of appeals and writs of error in parliament they continue, and are to be proceeded on *in statu quo* as they stood at the dissolution of the last parliament, without beginning *de novo*, 383

The dissolution of a parliament doth not alter the state of the impeachments brought up by the Commons in a preceding parliament, 384

PATENT, vide GRANTS by the KING.

A patent may be good in part and naught in part; so it may be repealed for part, and stand good for another part, 177, 178

A patent may be repealed in part, but that is in clauses independent, and not in clauses which have a general influence through the whole patent, 178, 179

A *Scire Facias* doth not lie to repeal part of a patent, 156

Void clauses in a patent are to be tried in an assize at law, and not by *Scire Facias*, which is the reason that judgment upon an issue tried on a *Scire Facias* to repeal a patent in *B. R.* is not there given, but the record is to be returned into this court, which is not in another case, 178, 179

The entry of the judgment in a *Scire Facias* to repeal a patent is, *Literæ Patentes vacentur*, and not part of them, 156

The king cannot have a *Scire Facias* to repeal a patent, but where the thing is *in deceptionem Regis*, or *ad gravamen Populi*, 155

There is a difference betwixt a *Scire*

Scire Facias to repeal a patent, and a *Quo Warranto*, for a *Quo warranto* may be good for part, and ill for another part, becauſe the record is not to be touched by it; but in a *Scire Facias* the record is to be cancelled, *P.* 156

Where the king grants two patents of the ſame thing, the ſecond patentee cannot have a *Scire Facias* againſt the firſt, *Quære*, *ibid.*

PERJURY, vide *EVIDENCE*.

Exceptions to the form of pleading in an information for perjury, 34, 35

A perſon convicted of perjury ſhall not have advantage of the errors in the firſt record, upon which he was convicted, 74

In an information of perjury, to prove the perjury, one was produced to prove what one, that is ſince dead, ſwore upon the firſt trial, and allowed good evidence, 170

PLEADING.

When the matters to be pleaded tend to infiniteneſs and multiplicity, whereby the rolls ſhall be incumbered in the length thereof, the law allows of a general pleading, 8, 9, 10

And therefore in an action upon the ſtatute of ſending knights to parliament the election ſhall be ſaid *per majorem numerum*, 9

In an *Aſſumpſit* the plaintiff declares that whereas he at the requeſt of the defendant amended ſuch a boat and divers other boats of the defendant, he aſſumed to pay for his labour and charges *tantum quantum*, and avers he mended one, and divers other boats, and deſerved ſo much; and adjudged good, *Page* 10

Treſpaſs for beating and impriſoning his wife, *&c.* the defendant juſtifies by warrant of the ſheriff; the plaintiff replies *de injuria ſua propria abſq*; *tali cauſo*, and iſſue upon it, and verdict for the plaintiff; and moved for a repleader, becauſe *de injuria ſua propria* is not a plea to matter of record, but held good enough after verdict, 50

In a *Scire fac.* againſt the bail upon a writ of error according to the ſtatute of 3 *Jac.* the defendant prays oyer of the condition, and on that he pleads, that the plaintiff proſecuted the writ of error with effect, and that the aforeſaid judgment was reverſed; *Et hoc paratus eſt verificare*, where it ought to have been, *prout patet per Recordum*; and the plea was ruled ill, 50

If a plea conclude *Hoc paratus eſt verificare*, where it ought to have been, *Hoc petit quod inquiratur per patriam*, it is matter of ſubſtance on demurrer, 94, 98

In treſpaſs the defendant pleads, That *Hen.* 8. was ſeiſed in fee, and ſo the land deſcended to the now king, and that he as ſervant, *&c.* The plaintiff replies, That *Hen.* 8. granted to the plaintiff, and doth not traverſe the dying ſeiſed of king *Charles*, and it might come to the king otherwiſe; and by *Twiſden* juſtice a traverſe needs not, 137, 138

In debt for rent of four rooms, the defendant pleads a leaſe of five rooms, and eviction of the fifth;

it is not good without a traverſe, *Page* 175

In treſpaſs on a traverſe the plaintiff concludes, *Et hoc paratus eſt verificare, unde petit Judicium* if the plaintiff *ab actione ſua prædicta præcludi debeat*; on this the defendant demurs eſpecially, becauſe he doth not conclude, *Unde petit Judicium & damna ſua occaſione tranſgreſſionis prædictæ ſibi adjudicari, &c.* and for this cauſe the court ſeemed for the defendant, 182

Matters that go in defeaſance of a deed need not to be alledged in the count, but come more properly on the defendant's part to be pleaded, 65

Where a matter is expreſly pleaded in the affirmative, which is expreſsly pleaded by the other party in the negative, the next ought to be an iſſue, and no traverſe, for otherwiſe they will plead *in infinitum*, 199

Accord, though executed in part, is no good plea to an action of treſpaſs and aſſault, 203

In a *Scire Facias* on a judgment in debt againſt an executor, the defendant pleads *Pleinment adminiſter* generally, and the plaintiff demurs ſpecially for that cauſe, if that be a good plea, 230

And leave given to amend the plea, 231

In a *Scire Facias* upon a judgment this plea hath been adjudged naught, in the time of *Glyn* chief juſtice. *In margin.* *ibid.*

Ancient demeſne is a good plea on the ſtatute of 31 *Hen.* 8. *cap.* 1. of partition, 249

A declaration in debt for rent arrear. is good without ſhewing mean aſſignments upon a demurrer, *Pages* 389, 390

It is a good plea to an action brought by an attorney for his fees, that the plaintiff did not give the defendant any bill of charges according to the ſtatute of 3 *Jac. cap.* 7. 245

In debt for rent on a leaſe for years, the defendant needs not plead a tender, otherwiſe where there is a condition in the leaſe, the breach whereof is to be ſaved, 418, 419

Though it is frequent to lay a declaration for a debt ſeveral ways in an *Aſſumpſit*, yet it is not a good plea to ſay, that the ſeveral ſums are but only for the ſum firſt mentioned, without pleading over, 449

POWERS.

A power to make leaſes to one, two or three perſons, he cannot by that power make a leaſe for the life of the firſt ſon of *J. S.* becauſe the perſon ought to be *in eſſe*; by *Wyndham* juſtice *arguendo*, 163

The earl of *L.* 21 *Eliz.* makes a ſettlement upon himſelf for life, the remainder upon his iſſues, the remainder to others, with a power of revocation by indenture ſubſcribed and ſealed by himſelf, to limit new uſes. The 26th of *Eliz.* he covenants to levy a fine to other uſes, and four years after levies a fine accordingly. And if this indenture and fine make a revocation of the uſes in the firſt deed was the queſtion? And reſolved, it was a revocation, becauſe the deed

deed and the fine are but one conveyance, *Page* 239

Tenant for life, with remainder over, with a power to make a jointure, and the tenant for life covenants to ſtand ſeiſed to the uſe of his wife for life, for her jointure; reſolved a good execution of the power, 239

A power to make leaſes being general is void, upon a covenant to ſtand ſeiſed, 248

Tenant for life, with a power to make leaſes to any perſon, for one, two or three lives, or for twenty-one years, reſerving the ancient rent, tenant for life demiſes to *B.* for twenty-one years to commence after the death of *J.* and *M.* the power is not well executed, being to commence *in futuro*, *ibid.*

A power reſerved to *D.* to revoke a deed by writing, ſubſcribed and ſealed by him in the preſence of two or more credible witneſſes, in expreſs words, *&c.* *D.* makes his will in writing, in the preſence of two credible witneſſes, without making any expreſs revocation; and adjudged a good revocation, and the will a good execution of the power, 295, 301

PRESCRIPTION.

If a man will preſcribe for a toll upon the ſea, he ought to alledge a good conſideration for it, for that by *Magna Charta*, and other ſtatutes, every one hath liberty to go and come upon the ſea, without impediment, 232, 233

In an action upon the caſe for not grinding at his mill, where one preſcribes for multure; reſolved, he muſt aver that his mill was ſufficient to grind all the corn, *Page* 327

PRIVILEGE.

One being choſen burgeſs of parliament, and having a trial at bar to be had before the ſitting of the parliament, moved to have his privilege allowed, but denied, in regard the parliament were not ſitting, nor to ſit till after the trial, 12

If one who is in the cuſtody of the marſhal may be ſued for lands in a county palatine, as well as he may be ſued in the Exchequer for lands in a county palatine, or in *Wales*, by *Quo minus*, 81

In an action upon the caſe for an eſcape, the defendant pleads the privilege of *eundo & redeundo* from an inferior court againſt a proceſs *in Banco*, and ſeemed to the court an ill plea, 109

If a man be arreſted in the face of the court, the court hath power to diſcharge him, but not otherwiſe, 101

Jurors that will have privilege upon a charter of exemption, ought to claim it in proper perſon, 113, 114

But ſhall not have it in *B. R.* nor in caſe where the king is party, without expreſs words, *ibid.*

The king's ſervants are privileged from arreſts, for that the king ſhall not be deprived of them without leave, 152

But they may be outlawed, for that it is for the advantage of the king, *ibid.*

An attorney is privileged from ſerving as reeve, 180

And alſo from being a ſoldier, *ibid.*

PRO-

PROCEDENDO.

On a *Habeas Corpus* a *Procedendo* granted for calling a woman whore in *London*, by three juſtices, *Page* 81

PROCESS, vide *CAPIAS.*

A warrant directed to a conſtable to take *H.* to find ſureties for his good behaviour, may be executed on a *Sunday*, notwithſtanding the new ſtatute, 250, 251

In all indictments for treſpaſs, and under felony, a *Venire fac.* is the firſt proceſs, 375

PROHIBITION.

Prohibition lies to the admiralty for ſuing there for mariners wages, 3

The granting prohibition is not a diſcretionary act of the court, but *ex debito Juſtitiæ*, 4

No prohibition lies to the admiralty for ſuing a recognizance there taken by way of ſtipulation againſt one that was ſurety in the nature of bail, 78

Where the freehold, or the power to grant an office may come in queſtion in the ſpiritual court, a prohibition ſhall be granted, 88

The plaintiff ſuggeſts, that the defendant libelled for defamation in the court of the arches, and that he is an inhabitant in the dioceſe of *London*, *contra formam Statuti* 23 *Hen.* 8. *cap.* 9. It was doubted if a prohibition would lie in that caſe, 91, 92

A prohibition is not *ex gratia*, but *ex debito Juſtitiæ*, 92

A prohibition denied to the ſpiritual court on ſuggeſtion that the executor was ſued there for double damages for not ſetting out of tithes, *Page* 95

A. makes his will, and thereby makes *G.* and *D.* his executors, *D.* makes his will and executors, and dies; *G.* dies inteſtate, his adminiſtrator ſues the executors of *D.* in the ſpiritual court for a legacy due from *A.* and a prohibition was denied by three juſtices *contra Keiling*, 123

A prohibition lies to the ſpiritual court, becauſe they refuſed to deliver a copy of articles; and they held that the ſtatute of 2 *Hen.* 5. *cap.* 4. extends where the proceedings in the eccleſiaſtical court are *ex officio*, as well as betwixt party and party; and that a prohibition lies for not delivering a copy of a libel in ſuch caſe, 170

On an *Aſſumpſit* brought in an inferior court, the defendant tenders a plea there, that the contract upon which the action is brought was made out of the juriſdiction; the court there refuſed to allow this; and on affidavit here of the ſaid tender and refuſal, this court granted a prohibition, 189

A prohibition granted to the court of the marches of *Wales* at *Ludlow*, on ſuing there for a legacy, contrary to their inſtructions, 191

Sir *D. M.* knight, was ſued in the eccleſiaſtical court by the name of ſir *D. M.* knight and baronet, and pleaded it there, that he is only knight, and not baronet; and the court allowed the plea, and proceeded to excommunication, and a prohibition was granted, 219

A pro-

A prohibition granted to the court of the chamberlain of *Chester*, for that a court of equity cannot charge the inheritance of a man's land with a rent, *P.* 221

The plaintiff had a judgment at law against the defendant, who exhibited his bill in chancery to be relieved against this judgment, and the plaintiff pleaded this judgment, and over-ruled there, and moved for a prohibition, grounding his suggestion on the statute of 4 *Hen.* 4. *cap.* 23. *Et adjournatur*, 227

The plaintiff suggests that there is a custom within the parish of *S.* that the churchwardens with the major part of the parishioners, may order the seats in the church there, and are to see to the repairs of them; and that the churchwardens would have placed the plaintiff in a pew there, and the defendant libelled against him in the spiritual court; the plaintiff prays a prohibition, and denied by three justices, against *Atkins* justice, 246

Suggestion, that the parishioner is to pay the tenth part of milk at the parsonage-house, or at any other place, is a good ground for a prohibition; by *Popham* justice. *In Margine*, 278

Prohibition denied upon a libel in the ecclesiastical court for procurations by an archdeacon, 360

In an attachment on a prohibition where damages are given to the plaintiff, there he ought to lay the visne where the suit in the ecclesiastical court was; otherwise the want of a visne hurts not, 387, 388

On a libel in the ecclesiastical court for tithes against *H.* and many others named in a schedule affixed to the said libel, the inhabitants pray a prohibition, and join in a suggestion of a *Modus*; and it appearing that the plaintiff in the ecclesiastical court ought to be prohibited, the *Quære* was, Whether they may have one writ of prohibition, or if they ought to sever? And resolved on examination of the cases, that the parties should bring several writs, for so had been the course of this court formerly, and therefore they would not alter it, although some of the judges of the *C. B.* were of opinion one writ might be granted for all, *P.* 425

The plaintiff sued the defendant in the ecclesiastical court at *York* for marrying his sister's daughter, and the defendant prayed a prohibition, because out of the levitical degrees; but denied by the whole court, because a cause of ecclesiastical conusance, 464, 465

Though sometimes prohibitions have been granted in causes matrimonial, yet if it were now *res integra*, they would not be granted, *ibid.*

A prohibition granted to the admiralty on suggestion that they had caused his ship to be arrested upon the land, within the body of the county, *&c.* 489, 496

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A record

A record daſhed through in nature of a cancellation, *Page 69*

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If there be two jointenants, and the one for money grants, bargains, ſells and confirms to the other; reſolved this amounts to a releaſe, 187

A releaſe of damages in dower ſuſtained *occaſione detentionis Dotis*, is no releaſe of the mean profits of the land, for they are two diſtinct things, 366

If by a releaſe of obligations & *ſcripta obligatoria* articles of agreement be releaſed, 393

It cannot be conſtrued to be the intent of the party to releaſe an agreement made to himſelf, when he joins another in the ſame releaſe, who was not party to the ſaid agreement, 393

In debt upon an obligation, the defendant pleads a releaſe of all errors, and all actions, ſuits and writs of error, whatſoever; and adjudged the releaſe extended only to writs of error, 399

Releaſe by one jointenant for life to another, doth not deſtroy a contingent remainder depending upon it, 413

If land be given to two, upon condition that they ſhall not alien, and one releaſes to the other, it is no breach of the condition, 413, 414

REMAINDER, vide *DEMISE.*

A fine was levied of lands to the uſe of the huſband and wife for their joint lives, the remainder to the heirs of the body of the wife by the huſband engendered, the remainder to the wife (ſhe ſurviving) for life, the remainder to the right heirs of the huſband; the huſband dies. And the queſtion was, If this eſtate-tail was executed in the wife, or contingent? And reſolved by all, that this eſtate is an eſtate-tail executed in the wife, *ſub modo*, not as to the diviſion of the jointure, but to other purpoſes; and no contingent remainder, *P.* 126, 127

And that it is no more than where an eſtate is limited to two, and the heirs of one of them, *ibid.*

If land be given to a woman during her widowhood, and after to the heirs of her body; this is an eſtate-tail executed, and not contingent, 127

A woman ſeiſed of lands in fee by indenture between her of the one part, and the lord *P.* of the other part, did demiſe the ſame to the lord *P.* to have and to hold to him for forty years, if ſhe lived ſo long, in truſt, that ſhe might receive the profits during her life; and after her deceaſe, then the one moiety thereof to be and remain unto *M. C.* and the other moiety to *J. B.* and their executors, *&c.* for the term of 1000 years; and the queſtion was, Whether the eſtate to *M. C.* and *J. B.* be good? And it ſeemed to the court that the remainder limited to *M. C.* and *J. D.* was void. 1*ſt*, It could not paſs to them by way of preſent eſtate, becauſe they were not parties to the indenture. 2*dly*, It could not be a contingent remainder, being a remainder for years depending on an eſtate for years, and there cannot be a contingent eſtate for years, becauſe a leaſe for years operates

operates by way of contract, and therefore the particular eſtate, and the remainder eſtate operate as two diſtinct eſtates grounded on ſeveral contracts, *P.* 150, 151

But in the ſaid caſe it was agreed ſuch a remainder may be of a freehold, as an eſtate for life, the remainder to the right heirs of *J. S.* is good, 151

A releaſe by one jointenant for life to another doth not deſtroy a contingent remainder depending upon it, 413

RENT, vide *DEBT*.

A rent-charge was granted to ſir *R. B.* and his heirs, and in the deed of grant was this clauſe, *That if the rent be behind*, &c. *then it ſhall be lawful for the grantee to enter and retain till he be ſatisfied.* Reſolved, the grantee by virtue of this clauſe may maintain an ejectment, 137, 138, 158, 159

But in ſuch caſe after his entry he hath only a pernancy of the profits; he cannot cut down trees, or pull down houſes; if he doth, treſpaſs lies againſt him, as againſt him who abuſes a diſtreſs; by *Wyndham* juſtice, 159

In debt for rent by the aſſignee of a reverſion, the defendant pleads, That before any rent arrear, he had aſſigned to another; and on demurrer adjudged for the plaintiff, by two juſtices, *contra Twiſden*, 162

In debt for rent of four rooms, the defendant pleads a leaſe of five rooms, and eviction of the fifth; it is not good without a traverſe, 175

Declaration in debt for rent arrear, is good, without ſhewing the mean aſſignments, on a demurrer, *Pages* 389, 390

In debt for rent on a leaſe for years, the defendant needs not to alledge a tender; otherwiſe where there is a condition, the breach whereof is to be ſaved thereby, 418, 419

REPLEVIN, vide *AVOWRY*.

In a replevin in the county, the plaintiff doth not declare, and the avowant removes the cauſe to the *King's Bench*, and the plaintiff is nonſuited without declaring; it ſeems in that caſe the defendant may ſuggeſt what cattle he took, and ſhall have a return of them, 33, 34.

The plaintiff in a replevin, ſince the ſtatute of 21 *Hen.* 8. *cap.* 19. may plead, nothing arrear, or any other plea, although he be a ſtranger, and doth not make any title to the land, 251

At common law a ſtranger could not plead any thing to the lord's avowry for rents or ſervices, but *Hors de ſon Fee*, or what did tantamount, 254

He cannot plead tenure by leſs ſervices, *Rien arrere*, or a releaſe, *ibid.*

But by the ſtatute of 21 *Hen.* 8. *cap.* 19. this ſtrictneſs is diſcharged; for as the avowant is not tied to avow upon any perſon, in certain, but upon the land within his ſeigniory; ſo the tenant of the land by the equity of the ſtatute is allowed to plead any plea to ſave and diſcharge his goods from the diſtreſs, 255

When the lord avows according to the ſtatute, the plaintiff in the replevin may have every plea that

that the very tenant might have had, though he be a ſtranger to the lord, *Page* 255
Tenant for years is within the ſtatute of 21 *Hen.* 8. *cap.* 19. 256
At the common law the tenant might plead any plea in bar to an avowry for a rent-charge, 256

RESERVATION, vide EXCEPTION.

In debt on an obligation againſt the defendant as heir; the defendant pleads, *Riens per Diſcent*, and on iſſue, the jury find, that *W. Armſtrong*, the defendant's father, was ſeiſed in fee of the manor of *D.* in 1657, and made a feoffment to *B.* and others, of all the ſaid manor, except the two meadows in queſtion, during his life, to the uſe of the defendant in tail; and whether the two meadows excepted did deſcend to the defendant, was the queſtion, 207
1. And reſolved by all, That the meadows deſcend to the defendant, *ibid.*
2. That the exception of the two meadows for his life, was a void exception, becauſe contrary to the rules of law, to have a livery operate *in futuro*; otherwiſe perhaps it had been if the exception had been for years only, *ibid.*
3. Though it be void, yet it doth amount to an indication of the intent of the feoffor, that the ſame ſhould not be according to the limitation of the other lands, *ibid.*
As a leaſe of a houſe with the lands thereto appertaining, though lands cannot properly belong to a houſe, yet it declares the intent of the party that it ſhould paſs, and ſo is as much as therewith enjoyed or uſed, *Page* 207
The plaintiff's anceſtor, (whoſe heir the plaintiff is) ſeiſed in fee, demiſes to the defendant, rendering rent to the leſſor, his executors, adminiſtrators and aſſigns, during the term, and the plaintiff declares as heir; the defendant demurs in law; and adjudged for the plaintiff; for though the reſervation be but to the leſſor and his executors, *&c.* yet it being (during the term) it ſhall run with the reverſion, 213
Leſſee for life makes a leaſe for years, which leſſee for years ſurrenders to the reverſioner, rendering rent; adjudged a good reſervation, becauſe it is a duty by way of contract, 222

RESTITUTION.

No reſtitution for goods taken upon an erroneous execution, for which damages had been already recovered in an action of treſpaſs, 74
Reſtitution is of duty, but re-reſtitution is of grace, 85

RETURN, vide SHERIFF.

RIOT.

By the ſtatute of 13 *Hen.* 4. *cap.* 7. the ſheriff is to join with the juſtices of peace in ſetting the fines on the rioters, otherwiſe it is error, 386

STATUTES.

WEST M. 2. *cap.* 48. The cutting down of timber trees by unknown perſons *nocturnè*, is not within this ſtatute, 487

33 *Edw.* 1. *de conſpiratoribus.* Before this ſtatute an action of conſpiracy did not lie for any thing beſides for indicting for felony and treaſon; but by this ſtatute it lies for treſpaſs, and againſt one only, *Pages* 176, 180

4 *Hen.* 4. *cap.* 23. If a prohibition lie into the court of *Chancery* on this ſtatute, 227

13 *Hen.* 4. *cap.* 7. In a riot the ſheriff is to join with the juſtices in fining the rioters, or elſe it is error, 386

2 *Hen.* 5. *cap.* 3. Extends where the proceedings in the eccleſiaſtical courts are *ex officio*, as well as between party and party, 170

2 *Hen.* 5. *cap.* 3. extends only to cauſes between party and party, 486

23 *Hen.* 6. A covenant for the true impriſonment of *J. S.* and alſo to pay chamber-rent, is a covenant for eaſe and favour within this ſtatute, 222

23 *Hen.* 6. *cap.* 10. If a ſerjeant at arms be within this ſtatute, 62

1 *Ric.* 3. *cap.* 3. Treſpaſs lies for ſeizing the goods of a felon before conviction, 414

4 *Hen.* 7. *cap.* 24. An eſtate-tail was barred by a fine, by virtue of this ſtatute, and before the ſtatute of 32 *Hen.* 8. 359

19 *Hen.* 7. *cap.* 9. expounded, touching *Capias's*, 129

21 *Hen.* 8. Of adminiſtrations, it is in the power of the ordinary to grant adminiſtration to the wife or next of kin, 93

21 *Hen.* *cap.* 5. Of inventories, when the judge may diſpenſe with bringing in an inventory, when not, 470, 471

23 *Hen.* 8. *cap.* 9. touching citations out of the dioceſe, *Pages* 91, 92

26 *Hen.* 8. *cap.* 3. Of firſt-fruits and tenths, 312, 313

31 *Hen.* 8. *cap.* 1. Of partition, ancient demeſne is a good plea, 249

32 *Hen.* 8. *cap.* 28. What ſhall be ſaid lands leaſed by a biſhop for twenty years laſt paſt, 165, 166

31 *Hen.* 8. *cap.* 24. Lands parcel of the poſſeſſions of the prior of *St. John of Jeruſalem*, that came to the crown by this ſtatute, are diſcharged of tithes, 225

32 *Hen.* 8. *cap.* 30. helps miſjoining iſſues, 358

34 *Hen.* 8. *cap.* 20. An eſtate-tail cannot be barred where the reverſion is in the crown, 358

35 *Hen.* 8. *cap.* 16. reaches not to cities and corporations, 485

37 *Hen.* 8 *cap.* 16. Lands lying out of the county palatine of *Lancaſter*, will paſs under the duchy ſeal, 90

2 *Edw.* 6. Of tithes. In debt on the ſtatute, it was held by the court, that a verbal agreement to pay money to the parſon in diſcharge of tithes, though it is not ſuch an agreement which may paſs the right; yet it is a good agreement within this ſtatute, to bar the plaintiff of his action, 14

22 & 23 *Car.* 2. *cap.* 5. extends not to treſpaſs of goods, 487, 488

29 *Car.* 2. Whether molaſſes be an imported material within this ſtatute, 305, 306, 307

9 *Car.* 2. Of frauds and perjuries, 334, 450, 451

CONCERNING STATUTES IN GENERAL.

Although an act of parliament be a private act, yet the judges are to take notice judicially of all parliaments and their seſſions, *Page* 191

Miſrecital of a ſtatute vitiates the count, *ibid.*

There is a difference when the action or information is grounded on an act of parliament, and the concluſion is *contra formam Statuti prædict.* there the action of information is not good, if the ſtatute be miſ-recited; but if the concluſion be *contra formam Statuti in hujuſmodo caſu edit' & proviſi,* there it may be good, notwithſtanding the miſrecital; *per Twiſden* juſtice, 192

Where a ſtatute gives a remedy for any thing, it ſhall be preſumed there was no remedy before at the common law. *In Margin.* 260

General words in an act of parliament do not comprehend an eſtate-tail, 322

Rules to conſtrue acts of parliament are different from the ſtrict rules of common law, 355, 356

Relative words in an act of parliament will make a thing to paſs as well as if it had been particularly expreſſed in the act itſelf, 54, 55

SHERIFF.

A ſheriff ought not to return privilege to be exempted from juries, but ought to ſummon them, and ſhall not be liable to an action for not returning them privileged, 113, 114

The ſheriff returns a reſcous againſt *S.* and others, and the return is, that *A.* being in cuſtody of my bailiffs, the defendant reſcued him out of the cuſtody of the bailiffs, and quaſhed, becauſe it ought to be out of the cuſtody of the ſheriff, *Page* 161

Upon a judgment in this court, a *fieri fac.* iſſued out; and upon a *Nulla bona* returned in *London*, the plaintiff takes out a *Teſtatum fieri fac.* directed to the ſheriff of *Montgomery* to levy the monies in the hands of the defendant executor: the ſheriff returns, that this is a county in *Wales*, and that *Breve Domini Regis non currit in Wallia*; adjudged an ill return, by three juſtices, 206

All hundreds that were not granted in fee by the crown before the time of *Ed.* 3. are joined to the office of the ſheriff, 361, 362, *&c.*

TAIL, vide *FINE.*

A LEASE made by tenant in tail without rendering any rent is not void, and if after he convey over his eſtate by fine, the conuſee in this caſe cannot avoid this leaſe, otherwiſe it ſeems when the tenant in tail makes a leaſe to commence at a day to come, there the conuſee may avoid it, 132, 133, *&c.*

If tenant in tail, where the reverſion is in the crown, be diſſeiſed, and the diſſeiſor levy a fine, and five years paſs, his iſſue ſhall be bound, 273

If a man purchaſe an eſtate-tail from the crown, a fine will bar his

his iſſues, notwithſtanding the ſtatute of 34 *Hen.* 8. *Page* 274
None can diſcontinue an eſtate-tail, unleſs he diſcontinue the reverſion, and therefore if tenant in tail infeoff the donor, it is no diſcontinuance of the intail, 344
An eſtate-tail cannot be docked neither by fine or recovery, where the lands are of the gift of the king, and the reverſion is in the crown, 359
But if ſuch reverſion be granted out of the crown, it may be deſtroyed by fine and recovery, 288, 358
The iſſue in tail was barred by a fine by virtue of the ſtatute of 4 *Hen.* 7. *cap.* 24. before the ſtatute of 32 *Hen.* 8. *cap.* 36. 359
A feoffment to the uſe of *A.* and his iſſues male of his body is no eſtate-tail in *A.* 317

TENANTS IN COMMON.

Action of the caſe lieth not for one tenant in common on a fraudulent ſale of all, by the other, 15
Tenants in common may join in an action of covenant for not repairing of an houſe, *&c.* 80
If two tenants in common make a leaſe for years rendering rent, and then one of them dies, the executor and ſurvivor may join in debt, or ſever at their pleaſure, *ibid.*
But if the leaſe be for life they ought to ſever, *ibid.*
They may join in waſte in the *Tenuit*, and in Detinue for deeds, *ibid.*
Tenants in common may join in an action upon the caſe for obſtructing a water-courſe. *In Margin ibid.*
In a writ of partition betwixt tenants in common by the ſtatute of 31 *Hen.* 8. *cap.* 1. *Page* 80
In an aſſize between two tenants in common, a forbidding by word of mouth to the tenant to pay his rent, was adjudged a diſſeiſin, 371

TENANT at WILL.

A. makes a leaſe at will, and then leaſes to another for years, to commence preſently, on condition that the ſecond leſſee enter not till the rent at will is due: reſolved, that the leaſe or agreement did ſo determine the will, as the action lies not againſt tenant at will for the rent, 224

TRAVERSE, vide *PLEADING.*

Where a matter is expreſsly pleaded in the affirmative, which is expreſsly pleaded by the other party in the negative, the next ought to be an iſſue, and no traverſe; for otherwiſe they will plead *in infinitum*, 199
In treſpaſs on a traverſe the plaintiff concludes, *Et hoc paratus eſt verificare, unde petit Judicium*, if the plaintiff *ab actione ſua prædicta præcludi debeat*; on this the defendant demurs ſpecially becauſe he doth not conclude, *Unde petit Judicium & dampna ſua occaſione tranſgreſſionis prædictæ ſibi adjudicari, &c.* For this cauſe the court ſeemed for the defendant, 182
In debt for rent of four rooms, the defendant pleads a leaſe of five rooms, and eviction of the fifth, it is not good without a traverſe, 173
The probate of a will is not traverſable, 406, 407

TREASON vide *CORONE.*

Before the ſtatute of 26 *Hen.* 8. no eſtate-tail was ever forfeited for treaſon, *Pages* 346, 348

When a priſoner is charged with the offence of killing the king, and the evidence is, that he at ſeveral times laboured it, and by ſeveral ways; and to each particular time and fact there is but one witneſs, and yet every of the ſaid facts conduces directly to the effecting and perpetration of the fact and treaſon charged upon the priſoner; ſuch evidence is ſufficient within the ſtatute; but otherwiſe it had been if the facts had been tending to another ſeveral treaſon, 407

Why two witneſſes are required in treaſon, 408

The ceremony for the priſoner of holding up his hand at the bar upon an arraignment of treaſon is only for the making known the perſon of the offender to the court; for if he anſwers that he is the ſame perſon, it is all one, 408

What truſts are forfeited for treaſon, 120, 121, 122, *&c.*

The king by the attainder ſhall have the ſame eſtate in law as the party had in equity, and no more; and therefore if a truſt be to *A.* for life, the remainder to *B.* and *B.* is attainted, the king ſhall have only the remainder and not the poſſeſſion, 122

For the ſtatute of attainder is like to the ſtatute of uſes, it executes truſts, 122

The father by attainder ſhall not forfeit a mortgage redeemed by the ſon, for that the ſon hath it as a purchaſor, *ibid.*

An indictment of high treaſon may be tried by *Niſi prius*, vide *trial*, *Page* 367

A *Tales de circumſtantibus* may be awarded in caſe of treaſon, by the ſtatute of 4 & 5 *Phil. & Mar. cap.* 7. where the king is party, 367

TRESPASS vide *TROVER.*

Treſpaſs for taking his goods *(inter al.) unam Sataginem*, Anglice *a frying pan*; on intire damages given, it being moved in arreſt that *Satago* was no latin word, and ſignifies nothing, but it ought to be *Sartago*; but adjudged for the plaintiff, for if it ſignify nothing, no damages are given for it, 15

Treſpaſs *vi & armis quare Phaſianos ſuos & Perdices ſuas capit*, held good by the court after a verdict, 16

After a rule of court to vacate judgment, treſpaſs lieth againſt him that took the goods in execution, 73

Treſpaſs for taking 40 ſheep, and chaſing of them, by reaſon of which chaſing one of them died; the defendant pleads, that the place in which the chaſing is ſuppoſed, was his freehold, and that he *leniter* chaſed them, *quæ eſt eadem tranſgreſſio.* The plaintiff replies, and juſtifies for common. Defendant rejoins by incloſure; the plaintiff demurs; and held, the bar was good without a traverſe, 185

Accord, though executed in Part, is no good plea to an act of treſpaſs and aſſault, 203

Treſpaſs *quare clauſum fregit pedibus ambulando & proſternere ſes fences continuando*

continuando tranſgreſſion. prædfrom ſuch a day to ſuch a day, *ad damnum, &c.* after verdict moved in arreſt of judgment, that there can be no *Continuand.* in breaking fences; and adjourned, *Page* 228, 396

If I bring an action of treſpaſs for taking my horſe, and uſing him twenty days, it ſeems I cannot lay it with a *Continuando*, 228

Treſpaſs *vi & armis*, the plaintiff counts that the defendant 14 *April* 30 *Car.* 2. did thruſt a woman named *M. Hunt*, upon his ſon named *H. Hunt* being an infant under the age of diſcretion, by means whereof his thigh-bone was broke, and the plaintiff inforced to expend great labour, and divers ſums of money to cure him, *ad damnum, &c.* and verdict and judgment for the plaintiff; by *Mountague* chief baron, and *Atkins* baron, *contra Raymond* baron, who held the ſon ought to bring the action, and not the father, 259, 260

The father cannot have an action of treſpaſs for beating his ſon, if it be not laid *per quod ſervitium amiſit.* By *Raymond* baron, 259

A father ſhall not have an action for the loſs of the marriage of his ſon and heir, except when a ſtranger takes him by force and marries him; but if the ſon marries himſelf, or a ſtranger procures him to marry one, the father hath no remedy. By baron *Raymond*, 259, 260

Treſpaſs *vi & armis* for taking the mare *ipſius querentis necnon bona & catalla ſequent.* and ſums them up, but doth not ſay that they were the goods *ipſius querentis*; and on demurrer it was held, the plaintiff may have judgment for the mare, and releaſe the action for the reſidue, *Page* 395

Treſpaſs *quare domum ſuam fregit* 1 *Maii continuando* till 1 *June*, is not good, but for feeding the graſs it is good, 396

Treſpaſs for throwing logs into the plaintiff's cloſe, with a *Continuando*, is not good, but if *diverſis diebus & vicibus* were in, it would be good, *ibid.*

Treſpaſs *quare clauſum fregit pedibus ambulando & proſterne ſes fences continuando* from ſuch a day to ſuch a day, ſeems not good after verdict, *ibid.*

Treſpaſs for ſpoiling corn in the blade may be with a *Continuando diverſis diebus & temporibus* for two years, *ibid.*

A demurrer to an action of treſpaſs with ſeveral continuances for that the ſeveral continuances of the treſpaſſes are ſeveral treſpaſſes by themſelves, and ought not to be declared upon with a *Continuando*; but left undetermined, 396

Treſpaſs lies upon the ſtatute of 1 *Ric. cap.* 3. for taking the plaintiff's goods, (being arreſted for ſuſpicion of felony) before conviction; and reſolved, money is goods within that ſtatute, 414

If a man have my goods by my delivery, and I afterwards demand them, and he refuſes to deliver them, an action of treſpaſs, *vi & armis* doth not lie, becauſe here was no tortious taking; but in ſuch caſe trover well lies, 472

When there is a tortious taking of goods and detaining them, the party may either have trover or treſpaſs at his pleaſure, and in

such case judgment in one of the said actions is a bar in the other, *Page* 472

Wherefoever the same evidence will maintain both the said actions, there the recovery and judgment in one may be pleaded in bar againſt the other, otherwiſe not, *ibid.*

The ſtatute of 22 & 23 *Car.* 2. *cap.* 5. extends not to treſpaſs of goods, 487, 488

TROVER and *CONVERSION*, Vide *BAR.*

Trover for two pair of pothooks, and divers other things, and alſo for hangers, held naught after verdict, becauſe of the incertainty of the word *hangers*, 2

Otherwiſe it had been brought for the pothooks and hangers only, admit, *ibid.*

Trover lies for a billiard-table, ports, ſticks and balls, *ibid.*

Trover and treſpaſs are actions ſometimes of a different nature, for trover will ſometime lie where treſpaſs *vi & armis* will not; as if a man have my goods by delivery to keep for me, and I afterwards demand them, and he refuſes to deliver them, I may have an action of trover, but not treſpaſs *vi & armis*, becauſe here was no tortious taking, 472

Sometimes the caſe may be ſuch, that either the one or the other will lie, as where there is a tortious taking of goods and detaining them, the party may have either trover or treſpaſs, and in ſuch caſe judgment in one action is a bar in the other, 472

Wherefoever the ſame evidence will maintain both the ſaid actions, there the recovery and judgment in one may be pleaded in bar againſt the other, otherwiſe not, *Page* 472

In trover by five, and before verdict one of them dies, and they proceeded to trial, and verdict for the plaintiffs, then the plaintiffs ſuggeſt that one of them is dead, and pray judgment for the reſt, and had it; and on error brought and aſſigned, that the party died before verdict, and ſo verdict given for a dead perſon, judgment was reverſed, for the ſame right continues, which was at the bringing the action, 63

And though in the ſaid caſe the plaintiffs were joint-tenants, and had a capacity of having the whole ſurvive, yet in truth every one had but a moiety, and ſo they were not at the time of the action intitled to ſo much as they are after the death of one of the plaintiffs, *ibid.*

TRIAL and *MISTRIAL.*

Covenant brought in one county, and the breach aſſigned for not repairing a houſe in another county, and the trial had in the firſt county; if it is a miſtrial, the court was divided, 85, 86

In caſes of trials concerning things ariſing in *Berwick*, the uſe is, to ſuggeſt upon the roll that the king's writ doth not run in *Berwick*, and pray a *Venire* may be of the next vill to *Berwick*, which is *Belfort*; and upon this a *Venire* is directed to the ſheriff of *Northumberland* to make come twelve out of *Belfort* to try this iſſue by *Niſi prius*; and this is a god trial, 173, 174

In

In debt upon an obligation conditioned to pay money in *Berwick*, was tried at *Belfort*, *Pages* 173, 174

A thing done in *Wales* ſhall at common law be tried in the next county adjoining, 173, 174

A thing in *Ireland* was tried in the county of *Salop*, which is alledged to be the next county to *Ireland*, 174

A miſtrial aided by the ſtatute of 16 & 17 *Car.* 2. *cap.* 8. 181

An indictment of high treaſon may be tried by *Niſi prius*, 367

A *Tales de circumſtantibus* may be awarded in caſe of treaſon, by the ſtatute of 4 & 5 *Phil. & Mar. cap.* 7. where the king is party, 367

A trial by conſent may be had in a foreign county where ſuch conſent is entered upon record, otherwiſe not, 372

If the iſſue be, No Knight, it ſhall be tried by the country, and not by the king at arms, 379

In a *Quare Impedit* the defendant pleads, That the plaintiff *puis le darrein continuance* was knighted, and the plaintiff denies it, and iſſue thereupon, and tried *per patriam*, *ibid.*

Seiſin of lands in *Kent* is tried in *London*, and it ſeemed to the court well enough after a verdict, by the ſtatute of 16 & 17 *Car.* 2. *cap.* 8. 392

Trial on a bond is to be where it is dated, 430

Nonage may be tried where the party was commorant, and not where the writ was brought, if collateral to the action, 458

TITHES, vide *PROHIBITION*:

Moved for a prohibition on ſuggeſtion, that the executors were ſued in the ſpiritual court for double damages for not ſetting out of tithes; but denied, *P.* 95

Lands parcel of the poſſeſſion of the prior of *St. John of Jeruſalem* that came to the crown by the ſtatute of 32 *Hen* 8. *cap.* 24 are diſcharged from payment of tithes, 225

On a bill in the Exchequer for ſmall tithes by a vicar, a queſtion aroſe, Whether a pariſhioner ſhall pay the tenth part of the milk of his cows every meal, or only every tenth meal; and decreed he ſhall pay every tenth meal only, 277

And that the tithe milk ought to be carried by the pariſhioners and delivered at the vicarage-houſe; by *Raymond* baron, 278

But the chief baron and the other two barons agreed that it ſhould be delivered in the church-porch, becauſe the neighbouring pariſhes did ſo, *ibid.*

Suggeſtion that the pariſhioner is to pay the tenth part of milk at the parſonage-houſe, or any other place, is a good ground for a prohibition; by *Popham* chief juſtice. *In Margin.* *ibid.*

Tender of tithe cheeſe at the houſe of the pariſhioner, is a good tender. *In Margin.* *ibid.*

In debt on 2 *Edw.* 6. for tithes, it was held by the court that a verbal agreement to pay money to the parſon in diſcharge of tithes, though it is not ſuch an agreement which may paſs the right, yet it is a good agreement within the ſtatute to bar the plaintiff of his action of debt, 14

VARIANCE.

VARIANCE.

IN an information of perjury tried at the aſſizes, it was reſolved by the court, that the jury there cannot have conuſance of any variance between the record and the information, but the judge there ought to determine it; and becauſe the jury had found it ſpecially, it was ordered that a *Venire de novo* ought to iſſue, 202

Variance betwixt the verdict and judgment in ejectment aſſigned for error but not determined, 398

VENIRE FACIAS.

In debt upon an obligation conditioned to pay money at the houſe of one *Yarrow* in *Wood-ſtreet magna, London*; the defendant pleads, that he paid the money at the ſaid houſe in *Wood-ſtreet*, but names no pariſh; on that a *Venire* iſſues to the pariſh of *St. Michael Wood-ſtreet*, and found for the plaintiff, and judgment. The defendant brings error, and aſſigns for error, That the pariſh of *St. Michael* is not named in any part of the record; but ruled good, being after verdict, 67

And by *Twiſden* juſtice, The words of the ſtatute of 21 *Jac. cap.* 13. by reaſon the *Viſne* is ſued out of more places, or of fewer places than it ought to be, ſo as one place be right named, are to be intended, when ſome of the places are named in the record, 67

And therefore if an action be laid in *D.* and a *Venire fac.* iſſues *de Corpore Comitatus*, there, altho' the *Venire* be awarded to more places, yet it is not good; becauſe the body of the county was not named before in the record, *ib.*

At a trial at the *Niſi prius*, the plaintiff changed the *Venire fac.* and panels, and had a jury the defendant knew not of; and held, that the defendant cannot be aided, if the firſt *Venire* was not filed, 76

And a difference taken when the firſt *Venire* was not filed, there he cannot be aided, becauſe the defendant may have reſort to the ſheriff, and have a view of the panel, to be prepared for his challenges; but if the firſt *Venire* was filed, then the defendant ſhall have a new trial; by *Twiſden* juſtice, and all the clerks, *ib.*

Judgment ſtayed for want of *Viſne*, 178

In an attachment on a prohibition where damages are given for the plaintiff, there he ought to lay a viſne, where the ſuit in the eccleſiaſtical court was, otherwiſe the want of a *Viſne* hurts not, 387, 388

Probos & legales homines in a *Venire* are of the ſame import as *Liberos & legales homines*, adjudged, 417

If ſince the expiration of the ſtatute 16 & 17 *Car.* 2. *cap.* 3. The *Venire* be *Quorum quilibet* may expend 20*l.* in lands. And reſolved by three juſtices, *contra Raymond* juſtice, That the writ was good, for that before any ſtatute it was, and now is in the power of the court to award a *Venire fac.* of what large ſum they pleaſe, 417, 418

VENUE, vide *VENIRE FACIAS.*

An action on the caſe for forging a will brought in *Middleſex*, but the land compriſed in it lay in *Suffolk*,

folk, and the *Venue* on motion changed to *Suffolk*, *Page* 33

VERDICT.

No privy verdict can be given in criminal cauſes which concern life, as felony, *&c.* becauſe the jury are commanded to look upon the priſoner when they give their verdict, and ſo the priſoner is to be there preſent at the ſame time, 193

But in criminal caſes, where the defendant is not to be perſonally preſent at the time of the verdict, a privy verdict may be given, *ib.*

An information was brought and laid in *Devonſhire*, and the trial there, and yet the jury gave a privy verdict in the county of the city of *Exeter*, which was held good by the court, becauſe the cuſtom hath always been to give the verdict in that place, *ibid.*

Although the commiſſioners have ſole authority to adjudge a man a bankrupt, yet in an action the jury muſt find whether he was a bankrupt or no, 337

Whereſoever it may be preſumed that any thing muſt of neceſſity be given in evidence, the want of mentioning it in the record, will not vitiate it after a verdict, 487

Want of attornment is aided after a verdict, *ibid.*

USES.

An uſe ſhall not be raiſed by covenant to ſtand ſeiſed, *&c.* when the parties intended it to another purpoſe, 43, 44, 45, *&c.*

The father in conſideration of affection, gave lands to his ſon, and livery was indorſed on the deed, but not made; and adjudged an uſe did ariſe to the ſon; and a difference taken where the father by feoffment gives to a ſtranger, to the uſe of his ſon, there no uſe ariſes; but when the conveyance is to the party himſelf, there the uſe will ariſe, 49

The father covenants to ſtand ſeiſed to the uſe of the heirs of his body by a ſecond wife, he having a ſon by the firſt; adjudged that the father took an eſtate for life, by implication, and that it was the ſame in effect, as if he had covenanted to ſtand ſeiſed to the uſe of himſelf for life, by expreſs words, and the heirs of his body by a ſecond wife, for that during his life they could not be heirs, ſo it muſt be intended after his death, and the rather becauſe it is in the caſe of an uſe, which are to be conſtrued to ſerve the party's intent, 228, 229, 230

H. covenants to ſtand ſeiſed, after his death, to the uſe of *J. D. H.* hath a fee-ſimple till his death, by *Hale* chief juſtice, 230

H. covenants to ſtand ſeiſed to the uſe of himſelf for life, remainder to the uſe of ſtrangers, and their heirs, during the life of *C.* Remainder to the ſons of *C.* ſucceſſively in tail-male, remainder to *E. B.* in tail. The covenantor dies before any ſons of *C.* born, and after a ſon is born. If *E. B.* next in remainder ſhall have the lands preſently, or ſhall ſtay till all iſſues be dead without iſſue male; and it ſeemed to the court, That this remainder to *E. B.* veſts immediately after the death of *H.* tenant for life, 248, 249

USURY.

If the party who lends the money, contracts for more than for 6*l. per Cent.* all the assurance is void; but if he doth not contract for more than the statute allows, and after he will take more, the assurance shall not be avoided, but the party shall forfeit the treble value, *Page* 197

As if a man, when money was at 8*l. per Cent.* lends money and takes bond for the same, and then the statute of 12 *Car.* 2. is made, and he will continue the old interest upon that bond, the bond shall not be avoided by such acceptance of interest, but the party shall forfeit the treble value of the statute, *ibid.*

On an information upon the statute of usury, he who borrows the money may be a witness, after he has paid it, but not before, 191

UTLAWRY.

After utlawry in a personal action, and before seizure, the party outlawed levies a fine, the conusee shall retain against the king, otherwise if the seizure be before the fine levied, the king shall not be ousted of his pernancy, 17

The king may dispose of the land itself of a person outlawed, by the course of the *Exchequer*, *ib.*

The king's servant may be outlawed, 152

In a writ of error to reverse an outlawry, the same outlawry is no good plea, 462

WAGER of LAW.

WAGER of law lieth of a debt recovered in a court baron, *Page* 386

In debt for 4*l.* recovered in a court-baron, for damages and costs there, in an action for words, the defendant offered to wage her law; and it seemed clear to the court, That though wager of law do lie of a debt recovered in a court-baron, yet it seemed to them, That that shall be intended of a debt originally sued for there, 386

But in the aforesaid case, no wager of law could have been upon the original action, because there is an injury supposed in the defendant, in which case no wager of law lies, and therefore the court refused her waging law in that case, *ibid.*

WALES, vide *TRIAL.*

An original writ out of the Chancery here doth not run in *Wales*, but a writ of execution doth, 206

By the statute of 27 *Hen.* 8. *cap.* 26. *Wales* is made part of the realm of *England*, *ibid.*

By the statute of 1 *Edw.* 6. *cap.* 10. the sheriffs of *Wales* ought to have their deputies in the courts at *Westminster*, *ibid.*

By the statute of 34 & 35 *Hen.* 8. *cap.* 26. all process for weighty causes shall be directed into *Wales* by the chancellor and council, which is intended the judges, *ib.*

An *Elegit*, *Fieri fac.* and a *Certiorari* lies into *Wales*, *ibid.*

FINIS.

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